S. Hrg. 100-90

NATIVE AMERICAN CULTURAL PRESERVATION ACT

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE-HUNDREDTH CONGRESS
FIRST SESSION

ON

S. 187

TO PROVIDE FOR THE PROTECTION OF NATIVE AMERICAN RIGHTS FOR THE REMAINS OF THEIR DEAD AND SACRED ARTIFACTS, AND FOR THE CREATION OF NATIVE AMERICAN CULTURAL MUSEUMS

FEBRUARY 20, 1987
WASHINGTON, DC

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NATIVE AMERICAN CULTURAL PRESERVATION ACT

FRIDAY, FEBRUARY 20, 1987

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Evans, Melcher, and Daschle.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, AND CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The Chairman. The hearing will please come to order.

This morning we gather to consider S. 187, the Native American Cultural Preservation Act, a measure which was introduced by Senator Melcher and cosponsored by Senators Burdick, McCain, and Bradley. And if I may ask the author of the measure, I would like to be listed as a cosponsor for it, also.

Senator Melcher. You certainly will, Mr. Chairman. We appreciate that.

The Chairman. We gather to discuss a proposal which would accommodate the interests of historic preservation and scientific inquiry while responding to the concerns of Native Americans regarding their sacred artifacts and skeletal remains.

This measure includes three major proposals. First, the establishment of a board to mediate disputes between museums and native groups over these issues; second, the establishment of a national Native American center, which will have an educational mission; and third, conforming amendments to the Archaeological Resources Protection Act.

[The text of S. 187 follows:]

100TH CONGRESS
1ST SESSION

S. 187

To provide for the protection of Native American rights for the remains of their dead and sacred artifacts, and for the creation of Native American cultural museums.

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1987

Mr. MELCHER introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To provide for the protection of Native American rights for the remains of their dead and sacred artifacts, and for the creation of Native American cultural museums.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Native American Cultural Preservation Act".

FINDINGS

SEC. 2. The Congress finds that—

(1) numerous museums, universities, and government agencies have considerable Native American collections that include artifacts of a sacred nature and

human skeletal remains that morally should be returned to the families, bands, and tribes;

(2) these artifacts and remains are extremely important to Native Americans;

(3) controversy exists between museums, universities, government agencies, and Indian tribes or Native Hawaiian organizations regarding the title to, preservation of, and contemporary disposition of, human skeletal remains and sacred artifacts; and

(4) there is a need to promote the development of museums archives, and historical preservation efforts within the Native American community through the provision of appropriate technical assistance.

DEFINITIONS

SEC. 3. For purposes of this Act—

(1) The term "deaccession" means the formal and official process of removal of a human skeletal specimen or sacred artifact from the collection of a museum.

(2) The term "repatriation" means the formal and official process of returning a sacred artifact or human skeletal specimen to the people from whom it originated.

(3) The term "Native American" means any individual who is—

(A) an Indian, or

(B) a Native Hawaiian.

(4) The term "Indian" means any individual who is an enrolled member of an Indian tribe.

(5) The term "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which—

(A) is recognized by the Federal Government or a State as eligible for special programs and services provided to Indians because of their status as Indians, or

(B) was terminated by Federal law after 1940.

(6) The term "Native Hawaiian" means any descendent of a person who, prior to 1778, was a native of the islands that constitute the State of Hawaii.

(7) The term "Native Hawaiian organization" means any organization which is recognized by the Governor of the State of Hawaii as an organization that primarily serves, and represents the interests of, Native Hawaiians.

(8) The term "traditional cultural authority" means any individual who is recognized by the members of an Indian tribe, in accordance with traditional

religious and cultural practices, to be an authority in the traditional cultural affairs of the Indian.

(9) The term "museum" means any museum, university, government agency, or other institution which possesses, or has any control over, any—

(A) skeletal remains of any Native American, or

(B) sacred artifacts.

(10) The term "sacred artifact" means any material which is devoted to, or dedicated to, a deity or some Native American religious purpose and utilized for the conduct and observance of Native American religion by an Indian tribe or by any individual who is a Native American.

NATIVE AMERICAN MUSEUM ADVISORY BOARD

SEC. 4. (a) There is hereby established the Native American Museum Advisory Board (hereafter in this section referred to as the "Board").

(b)(1) The Board shall consist of the following 17 members:

(A) 6 Indians providing appropriate regional and cultural representation who are appointed by the President from among a list of names of elders, spiritual leaders, and traditional cultural authorities submitted by the governing bodies of Indian tribes, 1 Native Hawaiian appointed by the President from among a list of elders and spiritual leaders submitted by the Governor of Hawaii,

(B) 2 members of the House of Representatives and 2 members of the Senate,

(C) 2 individuals appointed by the President who represent the sciences of archeology and anthropology,

(D) 2 individuals appointed by the President who are significantly interested and experienced in the matters which the Board is likely to consider and who provide representation for museums and universities,

(E) an individual appointed by the President who represents the Institute for American Indian Arts,

(F) the Secretary of the Smithsonian Institution or a designated representative of such Secretary,

(G) the Secretary of the Interior or a designated representative of such Secretary,

(H) the Secretary of Agriculture or a designated representative of such Secretary, and

(I) the Executive Director of the Advisory Council on Historic Preservation or a designated representative of such Executive Director.

(2)(A) Except as otherwise provided in subparagraph (B), the term of office for each member of the Board appointed under subparagraph (A), (B), (C), or (D) of paragraph (1) shall be 3 years.

(B) The terms of appointment shall be for four years with the initial term of one-half of the initial appointments being for two years. The President shall designate the term of office of such initial members of the Board at the time of their appointment.

(3) Each individual appointed by the President under paragraph (1) shall be significantly interested and experienced in the matters that the Board is likely to consider. Such appointments shall be made without regard to the political affiliations of such individual.

(4) The members of the Board described in subparagraphs (E), (F), (G), (H), and (I) of paragraph (1) shall not be eligible to vote on any matter considered by the Board; but such members shall be entitled to attend any meetings of the Board and to provide advice to the Board on any matter.

(5) The Board shall elect a chairman and vice chairman from among the members of the Board appointed under subparagraph (A), (B), (C), or (D) of paragraph (1). Such officers shall serve as chairman and vice chairman for a term of 1 year.

(6) Any individual appointed to fill a vacancy on the Board shall serve for the remainder of the unexpired term of the member who caused such vacancy. A vacancy on the Board shall not affect the powers of the Board.

(7) The presence of a majority of the members of the Board who are eligible to vote shall constitute a quorum for the purpose of conducting the business of the Board.

(8) The Board shall meet at least once during each quarter of each calendar year.

(c) The functions of the Board shall be—

(1) the resolution of disputes under the provisions of section 5,

(2) the provision of advice to the Native American Center of the Library of Congress, and

(3) the provision of advice to the Advisory Council on Historic Preservation on matters relating to Native American cultural and historical preservation.

(d) Each member of the Board who is not otherwise employed by the Federal Government shall receive compensation at a rate equal to the daily rate for GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day, including traveltime, such member is engaged in the actual performance of duties as a member of the Board. A member of the Board who is otherwise an officer or employee of the Federal Government shall serve without additional compensation; but all members of the Board shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of their duties as members of the Board.

(e)(1) The Board is authorized to appoint and fix the compensation, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, of an Executive Director and a General Counsel. The annual rate of compensation of the Executive Director and the General Counsel shall not exceed an annual rate equal to the annual rate provided for level V of the Executive Schedule under section 5316 of such title.

(2) The Executive Director appointed under paragraph (1) is authorized to appoint such employees as are necessary to enable the Board to carry out the functions of the Board.

(3) Notwithstanding any other provision of Federal or State law, the Board, and the Executive Director appointed under paragraph (1), shall extend a preference to Native Americans in employment by the Board.

(4) The General Counsel appointed under paragraph (1) is authorized to—

(A) appoint such other attorneys as may be necessary to assist the General Counsel,

(B) represent the Board in courts of law whenever appropriate, and

(C) perform such other legal duties and functions as the Board may direct.

(f) The Board is authorized to enter into agreements with the General Services Administration and any other agency of the Federal Government for the procurement of necessary financial and administrative services, for which payment shall be made by reimbursement from funds appropriated for the Board.

(g) The provisions of section 14 and subsections (e) and (f) of section 10 of the Federal Advisory Committee Act (5 U.S.C. Appendix 2) shall not apply with respect to the Board.

(h) There are authorized to be appropriated for each fiscal year such sums as may be necessary to enable the Native American Museum Advisory Board to carry out its functions for such fiscal year.

RESOLUTION OF DISPUTES

SEC. 5. (a)(1) The governing body of any Indian tribe or Native Hawaiian organization or the administrator of any museum may file with the Native American Museum Advisory Board a petition requesting the mediation of any dispute between a museum and an Indian tribe or Native Hawaiian organization relating to—

(A) the skeletal remains of any Native American who was—

(i) a member, or ancestor of a member, of such Indian tribe, or

(ii) a Native Hawaiian, or

(B) any sacred artifacts of such Indian tribe, of any member of such Indian tribe, or of any Native Hawaiian.

(2) A petition may be filed under paragraph (1) with respect to a dispute between a museum and an Indian tribe or Native Hawaiian organization only after the earlier of—

(A) the date that is 1 year after the date on which the petitioner submitted written notice to the other party to the dispute of the objections or demands of the petitioner,

(B) the date on which the other party to the dispute submitted written notice to the petitioner expressing a refusal to negotiate with the petitioner on the matter in dispute, or

(C) if the other party to the dispute does not acknowledge the written notice of the petitioner described in subparagraph (A), the date that is 90 days after the date on which the petitioner submitted such notice to such other party.

(b)(1) Upon receipt of a petition under subsection (a), the Native American Museum Advisory Board shall initiate an investigation to determine whether—

(A) any skeletal remains involved in the dispute identified in the petition—

(i) are of a Native American who was—

(I) a member, or ancestor of a member, of the Indian tribe that is a party to the dispute, or

(II) a Native Hawaiian, or

(ii) were found on lands historically occupied by such Indian tribe or by Native Hawaiians, and

(B) any artifacts involved in the dispute are sacred artifacts of such Indian tribe, of any member of such tribe, or of Native Hawaiians.

(2) If any of the determinations made under paragraph (1) with respect to a petition are affirmative, the Native American Museum Advisory Board shall mediate negotiations between the parties to the dispute identified in the petition for the purpose of obtaining an agreement between the parties that resolves those matters involved in such dispute.

(3) If all determinations made under paragraph (1) with respect to a petition are negative, the Native American Museum Advisory Board shall dismiss the petition.

(c)(1) If the Native American Museum Advisory Board determines that efforts to mediate a dispute under subsection (b)(2) have not been successful in resolving the dispute, the Native American Museum Advisory Board shall formulate a compromise settlement of that portion of the dispute that involves any matter which was the subject of an affirmative determination made under subparagraph (A) or (B) of subsection (b)(1).

(2) Any compromise settlement formulated by the Native American Museum Advisory Board under paragraph (1) shall—

(A) seek to accommodate—

(i) the interests of the Indian tribe or Native Hawaiian organization in—

(I) repatriation and reburial of any skeletal remains of any member, or ancestor of a member, of the Indian tribe or of any Native Hawaiian,

(II) repatriation and preservation of sacred artifacts of the Indian tribe, of a member of the Indian tribe, or of a Native Hawaiian, and

(ii) the interests of the museum in—

(I) access to such remains and artifacts for purposes of further study and research, and

(II) preservation of such remains and artifacts.

(B) In the event such compromise settlement provides for repatriation to the Indian Tribe or Native Hawaiian group, the settlement shall provide to the maximum extent possible for museum access to such remains or artifacts for research, study or exhibition provided that—

(i) the Indian tribe or Native Hawaiian organization approves of such research or study, and

(ii) the museum agrees to share with the Indian tribe or Native Hawaiian organization any information obtained from such research or study before such information is published.

(3) Upon completing the formulation of a compromise settlement of a dispute under paragraph (1), the Native American Museum Advisory Board shall—

(A) submit a copy of such settlement to each party to the dispute,

(B) publish a summary of such settlement in the Federal Register, and

(C) monitor the actions of each party to the dispute to determine whether such settlement is being fully carried out within a reasonable period of time.

(d)(1) Notwithstanding any other provision of law, if, as a result of the monitoring conducted under subsection (c)(3)(C), the Native American Museum Advisory Board determines that—

(A) the compromise settlement formulated under subsection (c)(1) is not being carried out, and

(B) the museum which is a party to the dispute is primarily responsible for the failure of such settlement to be carried out,

such museum shall, during the 2-year period beginning on the date on which notice of such determination is published in the Federal Register, cease to be eligible to receive any Federal funds and to receive benefits under any Federal program or any program funded (in whole or in part) with Federal funds.

(2) Notwithstanding any other provision of law, if, as a result of the monitoring conducted under subsection (c)(3)(C), the Native American Museum Advisory Board determines that—

(A) the compromise settlement formulated under subsection (c)(1) is not being carried out, and

(B) the Indian tribe or Native Hawaiian organization which is a party to the dispute is primarily responsible for the failure of such agreement to be carried out,

the Indian tribe or Native Hawaiian organization shall, during the 2-year period beginning on the date on which notice of such determination is published in the Federal Register, cease to be eligible for any Federal funds or benefits provided for historic preservation.

(3) The Native American Museum Advisory Board shall publish in the Federal Register notice of any determination made under paragraph (1) or (2) and shall provide direct written notice of such determination to the head of each Federal agency or department which such Board has reason to believe may be providing Federal funds to—

(A) the museum, Indian tribe, or Native Hawaiian organization that is the subject of such determination, or

(B) any program which provides benefits to such museum, Indian tribe, or Native Hawaiian organization.

(e) Any determination made by the Native American Museum Advisory Board under this section shall be final and shall not be reviewable in any court.

NATIVE AMERICAN CENTER

SEC. 6. (a) There is hereby established within the Library of Congress a bureau which shall be known as the "Native American Center".

(b) The functions of the Native American Center shall be—

(1) the preparation, and coordination with museums, of a provenance (to the fullest extent possible) of all—

(A) skeletal remains of Native Americans,

(B) sacred artifacts, and

(C) other artifacts and collections relating to Native American history or culture,

that have been acquired or collected with the assistance of the Federal Government or by use of Federal funds,

(2) the preparation, for distribution or sale to Indian tribes, Indian tribal organizations, Native American educational institutions, and other educational institutions, of educational materials on collections that relate to Native American history or culture,

(3) the continual provision of advice, support, and technical assistance to Indian tribes and Native Hawaiian organizations in—

(A) the establishment of model museums and archives, and

(B) historical preservation, including preservation through cultural photography, and archeological and anthropological activities,

(4) the promotion of cooperation and coordination of activities between Indian tribes, and museums located in the United States,

(5) the promotion of cooperation, dialogue, and sharing of artifacts, materials, and information between Indian tribes, Native Hawaiian organizations, and mu-

seums located in foreign countries which have collections that contain—

(A) skeletal remains of Native Americans,

(B) sacred artifacts, or

(C) other artifacts relating to Native American history or culture,

(6) the provision of seminars on Native American history and culture,

(7) the publishing of academic papers and articles on Native American history and culture, but only after consulting with—

(A) the Indian tribes that are the subject of such papers or articles, or

(B) Native Hawaiian organizations if Native Hawaiians are the subject of such papers or articles,

(8) the provision of advice and assistance to museums on the proper care and preservation of—

(A) skeletal remains of Native Americans,

(B) sacred artifacts, and

(C) other artifacts relating to Native American history or culture,

in a manner that is consistent with, and sensitive to, the culture of Native Americans, and

(9) the provision of advice, financial assistance, and technical assistance for—

(A) the identification, deaccession, and disposition of any skeletal remains of Native Americans, and

(B) the repatriation of sacred artifacts and any other artifacts relating to Native American history or culture.

(c)(1) The Native American Center shall be administered by the Director of the Native American Center, in consultation with the Native American Museum Advisory Board. The Director of the Native American Center shall be appointed by the Native American Museum Advisory Board, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code. The annual rate of compensation for the Director of the Native American Center shall not exceed an annual rate equal to the annual rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(2) The Director of the Native American Center, in consultation with the Native American Museum Advisory Board, shall appoint and determine the compensation of—

(A) an individual who has at least a master's degree in archeology,

(B) an individual who has at least a master's degree in cultural anthropology,

(C) an individual who has at least a master's degree in history, and

(D) other support staff,

without regard to the provisions of title 5, United States Code, regarding appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, but the annual rate of compensation for such employees shall not exceed an annual rate equal to the annual rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) Notwithstanding any other provision of Federal or State law, the Director of the Native American Center shall extend a preference to Native Americans in—

(A) admissions to, and enrollment in, programs conducted by the Native American Center,

(B) employment by the Native American Center, and

(C) assistance provided by the Native American Center.

(d) In order to assist the Native American Center in carrying out the requirements of subsection (b)(1), each museum that has received Federal funds, or has participated in any programs funded (in whole or in part) with Federal funds shall prepare a provenance of all—

(1) skeletal remains of Native Americans,

(2) sacred artifacts, and

(3) other artifacts and collections relating to Native American history or culture,

that are under the control of such museum.

(e)(1) The President shall include with the budget submitted under section 1105 of title 31, United States Code, for each fiscal year beginning after the date of enactment of this Act, a separate statement which specifies the amount of funds requested by the President for the Native American Center for such fiscal year.

(2) There are authorized to be appropriated for each fiscal year such sums as are necessary to enable the Native American Center to carry out its functions.

CONFORMING AMENDMENTS TO THE ARCHEOLOGICAL RESOURCES PROTECTION ACT OF 1979

SEC. 7. (a) Section 3 of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470bb) is amended—

(1) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "or Native Hawaiian community or organization", and

(2) by adding at the end thereof the following new paragraphs:

"(8) The term 'Native Hawaiian' means any descendant of a person who, prior to 1778, was a native of the islands that constitute the State of Hawaii.

"(9) the term 'Native Hawaiian community or organization' means any community of Native Hawaiians or any organization which primarily serves and represents Native Hawaiians.

"(10) The term 'religious or cultural site' means any location or land area deemed by an Indian tribe to have value in the traditional culture or religion of such tribe, including, but not limited to, areas where religious practices are or were in the past carried out, areas where visions are or were sought, areas figuring in tradition, and areas known or thought to contain graves or human skeletal material.

"(11) The term 'sacred artifact' means any material which is dedicated to a deity or some religious purpose of an Indian tribe or of any member of an Indian tribe and utilized for the conduct and observance of the religion of an Indian tribe or of any member of an Indian tribe.

"(12) The term 'traditional cultural authority' means any individual recognized by the members of an

Indian tribe, in accordance with their traditional religious and cultural practices, to be an authority in the traditional cultural affairs of the Indian tribe.".

(b) Subsection (b) of section 4 of such Act (16 U.S.C. 470cc(b)) is amended—

(1) by inserting "except as provided in subsection (k)," before "the archaeological resources" in paragraph (3),

(2) by striking out "and" at the end of paragraph (3),

(3) by striking out the period at the end of paragraph (4) and inserting in lieu thereof ", and", and

(4) by adding at the end thereof the following new paragraph:

"(5) the applicant will comply with the provisions of subsection (k).".

(c) Subsection (c) of section 4 of such Act (16 U.S.C. 470cc(c)) is amended by inserting "and shall consult with such Indian tribe as to whether, and under what terms and conditions, the permit should be issued" after "cultural importance".

(d) Section 4 of such Act (16 U.S.C. 470cc) is amended by adding at the end thereof the following new subsection:

"(k) If graves, human skeletal materials, or sacred artifacts are excavated, or may be excavated under permits issued under this section, or otherwise exhumed on public lands or Indian lands, the Federal land manager shall consult with appropriate archeological and physical anthropological authorities and—

"(1) with the Indian tribe having cultural affiliations with the deceased individuals represented by such graves or skeletal material, or with the users of such sacred artifacts, or

"(2) if the deceased individuals or users were not members, or ancestors of members, of an Indian tribe, with representatives of any other community or group having such affiliations,

to determine the disposition of such graves, skeletal material, or sacred artifacts. In the event agreement cannot be reached with such authorities, the Federal land manager shall seek mediation by the Native American Museum Advisory Board if an Indian tribe is involved. Until an agreement is reached or mediation had been completed, the graves, human skeletal material, or sacred objects in question shall be maintained either in place or in storage (for no longer than 18 months) in a secure and respectful manner and shall be subjected to only such study as the Indian tribal government or other representatives consulted under this subsection may permit.".

(e) Section 11 of such Act (16 U.S.C. 470jj) is amended—

(1) by inserting ", Indian tribes," after "Indian lands" in paragraph (2), and

(2) by inserting ", Indian tribes," after "referred to in paragraph (1)".

The CHAIRMAN. Before proceeding with our witnesses, may I call upon the author of the measure, the distinguished Senator from Montana, Senator Melcher.

STATEMENT OF HON. JOHN MELCHER, U.S. SENATOR FROM MONTANA

Senator MELCHER. Thank you very much, Mr. Chairman.

The bill incorporates, by law, procedures to return the skeletal remains and sacred artifacts to the families, bands, and tribes of Native Americans. The present situation is this. The skeletal remains of Native Americans are stored in museums in this country and abroad. When I say "abroad," it's principally Spain, Germany, and England. In this country alone we have no idea of how many skeletal remains or sacred religious artifacts might be in museums, but we do know that in the Smithsonian alone there are 18,000 specimens of remains. By that I mean 18,000 skeletons, or a part of a skeleton—just the cranium or just the bones of the face, the head—are there, some of them not identified.

Now, how did they get there? Well, in the early stages of this country, when we—those of us who are not Native Americans—were battling and conquering Indians, there was returned and collected—collected, first of all, and returned to Washington—by the Army itself innumerable skeletal remains. The Army had a museum that they were collecting them in. Some were picked up from battlefields; some were actually picked up from graves; I'll give you two examples, and I'll submit these letters for the record.

This is a record that identifies one of the Smithsonian's skulls, dated in January 1869:

> The skull of an old Indian whose father was Yankton and mother a Brule, died on this post on the 7th day of January, 1869, was buried in his blankets three feet in the ground about half a mile from the fort within a few rods of the teepees occupied by his friends. I secured his head in the night of the day he was buried. From the fact he was buried so near these lodges, I did not know but what I was suspected in this business, and that it was their intention to sleep watch over the body. Believing that they would hardly think that I would steal his head before he was cold in his grave, I early in the evening with two of my hospital attendants secured this specimen. In the grave I found an Army kettle, and old sheet was placed over the body. I suppose to keep the wolves from getting at it.

It's signed, if I can read this correctly by A.P. Hachington.

The only other example to submit for the record is this one. It's dated in August of 1870: "Sir," is the salutation,

> I have the honor to forward through you to the Surgeon General, U.S. Army, in compliance with circular dated September Ist, 1868, two specimens of Indian skulls from broken graves of the Sioux Tribe. They are known by good authenticity to be those of two noted chiefs, Blackfoot and Twoface, who were hung on the order of Colonel Moonlight of 11th Kansas Volunteer Cavalry in 1860.

I just want to submit these two letters for the record to give some idea of how this happened.

The CHAIRMAN. Without objection, they will be made a part of the record at the conclusion of your oral presentation.

Senator MELCHER. There are other examples that you can peruse in the Smithsonian including one that occurred hear my hometown, Forsyth, MT, where some Blackfeet skulls were picked up from a battlefield that had occurred not between the United States

Army and the Indian tribe, but between the Crow and the Blackfeet.

So there are various examples, and some of these skeletal remains are identified and some are not. They're not all cataloged or listed as to just how they were obtained. This Army museum, which in the past century encouraged—as one of the letters I gave as an example—this collecting through an official circular directing that specimens be collected. Those remains were forwarded to the Smithsonian at some time, and still reside there.

Of course, remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning. We do not intend in any way to interfere with this study and science in the bill; rather, the bill would permit the living to prove the identity of their ancestors and set up the procedure for the return of those bones and skeletal remains, once they have been proven to belong to a family, band, or tribe of Native Americans.

The bill would also permit the living descendants, after having secured those remains of their deceased ancestors and having had them returned, to use the proper respect that is due the dead.

Now, on the sacred artifacts taken from the Native Americans, it must be understood that these are important for religious ceremonies. They are a mainstay of the Native Americans culture, both in the past and in the present and, we would assume also, in the future. The ceremonial nature and the religious beliefs of Native Americans are tied to these sacred artifacts. So when they can be identified, it's important that they be identified now and the procedures of return set in motion. And I say that particularly because we're talking about living tribal members identifying the skeletons of their ancestors.

We will hear testimony today, Mr. Chairman, from one of the Northern Cheyenne who will have a startling story, a true story, to tell us how one of the sacred artifacts, extremely important to the Northern Cheyenne, was discovered to be in the Smithsonian.

All of this is not to say that the procedures could not be done voluntarily by the museums and a method arrived at that could accomplish what the bill seeks to do. What the bill will do is set the procedures and give the assurance to Native Americans that it is a formal procedure where, when skeletal remains or the religious sacred artifacts can be clearly demonstrated—that is, proved—to belong to a band or tribe, that the law will return these items to them.

That is the most important part of the bill.

The bill also deals with the training, education, exchange of cultural information between Native Americans and the rest of us. These programs will be headed, of course, by museums and archaeologists, to learn more and exchange our knowledge between the two cultures on the significance of the common heritage of both Native Americans and non-Native Americans.

I think that the bill is timely and is very much needed. There may be other ways of arriving at it and the bill may need to be modified or rewritten in parts; that's no problem for those of us who are sponsoring it. We seek that type of advice and that type of counsel.

I think I should submit this also for the record, Mr. Chairman. It is a statement to me from the Native Americans Advocacy Project, Friends Committee on National Legislation, where they are saying they will formally submit a letter of thanks to be included in the record of today's hearing on this bill.

The CHAIRMAN. Without objection, it will be received and made part of the record.

Senator MELCHER. Thank you very much, Mr. Chairman.

[Materials supplied by Senator Melcher appears in the appendix.]

The CHAIRMAN. Our first witness is a distinguished elder and religious leader of the Northern Cheyenne Tribe, Mr. Bill Tall Bull.

This committee is pleased and honored to receive your testimony, sir.

STATEMENT OF BILL TALL BULL, ELDER AND RELIGIOUS LEADER, NORTHERN CHEYENNE TRIBE, INC., LAME DEER, MT

Mr. TALL BULL. Thank you, Mr. Chairman, members of the committee. I bring to you greetings from the Northern Cheyenne Nation this morning and a Tribal Council resolution supporting S. 187 in its entirety.

I will speak briefly about the artifacts situation. The Cheyennes have two covenants in their possession, given to them by God. These two covenants, when they are discussed in a situation where discussion is needed—usually, it is done in a very solemn, quiet manner by the elders of the tribe. It is with great respect discussions be held quiet.

I come to you as a member of the Dog Soldiers Society, one of the four warrior societies that guard and protect the covenants and that have responsibility to make sure that the rituals are carried out from beginning to end, that everyone comes together at the time of rituals, that everything is properly in its place, with the fact that the rituals are exacting, are in sequence, and there are no substitutions.

When a ritual takes place and it is determined that an item is missing, it is a duty of the warrior society to seek out that item. If that item cannot be presented so that the ritual can continue, then the ritual stops. It has to be determined at this point whether the ritual is to continue, of whether the ritual can continue without this item. If the ritual continues without this item, it is demoralizing to all people that are present in camp. This is the situation which we find ourselves in.

There are two pieces of artifact that I'm going to be referring to. One is a strap that belongs to the covenant, and this strap has a function within the ceremony itself. It is a means by which order is given in a ritual. The numbers of times that the sweet grass is burnt, the offers are given—are recorded on the strap. There can be no mistake. This strap is in a museum. The elders of my tribe have tried to discuss the nature of the ritual, the nature of its importance, and they have failed.

I believe it is my duty, as a warrior society member, to try every means possible to fulfill that ritual with its return.

Another artifact that I'm going to be referring to is that I have an accompanying photograph which was given to me by the Smithsonian people; it is a pipe. It is a part of a "chief bundle." The chief bundle was carried by Chief Tall Bull and his dog soldiers when they were chased by Major North's troops in the battle that took place at Summit Springs, CO in 1869, at which time they destroyed the entire camp. They left two lodges standing; they did not know which lodge housed the two German women that were captured by the dog soldiers. One of those lodges was Tall Bull Lodge. In the lodge, the soldiers took the chief bundle. The bundle consisted of a pipe, a dog soldier rattle—I have the description of the rattle. Included in it was tamper made from greasewood; sweet grass, bagged up in buffalo wool. And I don't know what else was in that bundle, but those are the main items. And those items—we did not know that these items existed until I came here several years ago and found that it is located here.

I took word home. I met with the dog soldiers at home, and they were most happy to hear that this still existed. It is—the ceremony by which this is used gives the authority for the chiefs to reseat the membership of that society. This has not been properly done at home, and the chiefs of the dog soldiers would like to discuss the return of this item.

The other question is—I went to Fort Robinson as part of research work done for Dull Knife Memorial College at home, where I tried to find the bodies of the Cheyennes that broke out of Fort Robinson. I was told by the Government historians that there was a mass grave, and I could not find it. I found out later that, through Government-issued orders, the bodies were taken—put on a train, sent to medical schools in Canada and Pennsylvania. I have not been able to locate the remains of those people. They may be part of the collection that is located here, but the search goes on.

Gentlemen, do you have any questions?

[Prepared statement of Mr. Tall Bull appears in the appendix.]

The CHAIRMAN. Mr. Tall Bull, I thank you very much for your testimony.

Are you advising the committee that, in your attempts to acquire the return of these skeletal remains and religious artifacts from the Smithsonian, you have not been successful?

Mr. TALL BULL. I have not been successful, no.

The CHAIRMAN. It is your belief that with this bill you will be able to acquire possession once again?

Mr. TALL BULL. I hope this bill will do that. Yes, sir.

The CHAIRMAN. I can assure you, sir, that as Chairman of this committee I will do my best to see that this measure is passed.

Mr. TALL BULL. Thank you.

The CHAIRMAN. Senator Melcher.

Senator MELCHER. Bill, how old are you?

Mr. TALL BULL. I am 66 years old, sir.

Senator MELCHER. You are 66. Have you even seen the pipe?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. You have seen it now?

Mr. TALL BULL. Yes.

Senator MELCHER. Is it at the Smithsonian?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. Had you ever seen it before?

Mr. TALL BULL. No.

Senator MELCHER. Had your father—what was your father's rank in the Dog Soldiers Society?

Mr. TALL BULL. He was a member and a doorkeeper.

Senator MELCHER. And a doorkeeper?

Mr. TALL BULL. Yes.

Senator MELCHER. Now, the society still exists? Is that true?

Mr. TALL BULL. Yes.

Senator MELCHER. The morale that you spoke of, of the society not being able to perform the traditional practices involving the pipe—what has it done to the society itself?

Mr. TALL BULL. The society has split———

Senator MELCHER. Has split?

Mr. TALL BULL. Into two, right.

Senator MELCHER. It split in two?

Mr. TALL BULL. It has split in two because the authority has not been handed down to each one. And the way that it is done, it is through the smoking of the pipe to reaffirm the commitments of each warrior.

Senator MELCHER. Are you—what is your recognized rank in the society?

Mr. TALL BULL. I am the spokesman for my brother, who carries the whip, who is the authority to enforce the laws of this society.

Senator MELCHER. Now, does this have any effect on the members of the tribe who are not members of the society?

Mr. TALL BULL. Yes; when the warrior soldier societies are not effective———

Senator MELCHER. Pardon me?

Mr. TALL BULL. When the soldier societies are not effective, then the laws are not effective because the authority to carry them out is not there.

Senator MELCHER. Now, in the bundle you referred to, was the pipe itself the most significant part of the bundle that was missing?

Mr. TALL BULL. Yes.

Senator MELCHER. How did you happen to find out that it now resides in the Smithsonian?

Mr. TALL BULL. Apparently, there was an Army record that indicated that this was taken from Tall Bull Lodge at Summit Spring.

Senator MELCHER. About when was that?

Mr. TALL BULL. In 1869.

Senator MELCHER. In 1869?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. And that reocord, then, is at the Smithsonian?

Mr. TALL BULL. Apparently, it is.

Senator MELCHER. When you saw that record, had you seen the pipe itself?

Mr. TALL BULL. No; I had not seen the pipe itself. The Army record—there were several records—that I had that I was trying to tie it to some camp, some incident that involved my people. It so happened that the same day that I went down to the Smithsonian to look at photographs that were taken of the artifacts, we went to see one place where they had pipes. When they pulled a drawer out, they said, "Here is the pipe that is referred to in the record," and then the photograph itself indicated that this was the Tall Bull pipe.

Senator MELCHER. Had the pipe been described to you previously?

Mr. TALL BULL. No.

Senator MELCHER. It had not been described?

Mr. Tall Bull. No.

Senator MELCHER. You would not know, then, what the pipe really looked like?

Mr. TALL BULL. Right. I did not know until I saw the Army record and the picture.

Senator MELCHER. All right.

Now, what is the effect of this low morale or feeling of incompleteness in ceremonial practices of the Dog Soldier Society? What does that mean? Does that have some effect other than morale? What's the belief?

Mr. TALL BULL. It is largely the morale.

Senator MELCHER. It's largely the morale?

Mr. TALL BULL. The morale. When we gather together, we like to gather together that someone has authority, someone is a chief, someone has no longer—we lost membership. We need someone to be the doorkeeper. We need someone to be the one to do the errands. We need someone to fulfill those positions in the society.

Senator MELCHER. Do the Northern Cheyenne believe that the ceremonial practices which are—really, I guess, religious practices, religious prayer—do they believe that by following these ceremonial practices and by following these religious ceremonies, that the tribe will fare better in the world or be more prosperous?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. That is an on-going belief?

Mr. TALL BULL. That is an on-going belief.

Senator MELCHER. And it is part of the religion and heritage of the Northern Cheyenne?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. It is not dying out?

Mr. TALL BULL. No.

I would like to say that since we have the two covenants, the laws under which we live are those laws of the covenant.

Senator MELCHER. The covenant is itself a part of living a good life?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. It is compatible with whatever specific other religions that the members of the tribe might adhere to?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. It's just part of living—it's an augmentation of whatever other religious beliefs the tribe members may have?

Mr. TALL BULL. Yes, sir.

Senator MELCHER. I thank you.

The CHAIRMAN. I thank you very much, Mr. Tall Bull.

Our next witness is the Chairman and Chief of the Blackfeet Tribal Council, Chief Earl Old Person.

Chief Old Person, welcome to the committee. We'd be most pleased and honored to receive your testimony.

STATEMENT OF CHIEF EARL OLD PERSON, CHAIRMAN AND CHIEF, BLACKFEET TRIBAL COUNCIL, BROWNING, MT

Chief Old Person. Thank you, Mr. Chairman, members of the committee. I do have a statement that's being submitted for the record.

The Chairman. Your prepared statement will be inserted in the record immediately following your oral presentation.

Chief Old Person. I do want to make some brief comments about why I am here. To my left I am accompanied by one of my Blackfeet members and my legal counsel, Vicki Santana.

The Blackfeet people are very pleased that they are being part of this hearing that is taking place regarding our ancestry and our cultural way and religious way of life.

I think there's been a great deal that has been said by the former individual that has just given the testimony. I don't think there's any difference within the Blackfeet people in how they recognize our Indian way of religion, our Indian way of background as far as our ancestors, the way they have lived.

Today, I'm not here just as a tribal leader; I am here as a member of some of our religious society groups. I am a member of the Brave Dog Society, that still exists today; the Blacktail Society Group—this is a religious group that still exists today. In fact, they just had a ceremony about 2 weeks ago.

I have background where my father belonged to many of these religious groups, and my mother, likewise.

I was very amazed at a collection of tapes that were presented to some of the tribes. In listening to just a few of these tapes, it became very significant. Why I say this, I have with me—in one of the songs, I have heard the names—and in particular, this song that was sung was very significant to me because I was given by one of the elders the buffalo stone. In those tapes, a song was sung, and it was the buffalo stone song. Not very many have these stones. There are only four that were given by the spirits that our people believed in. The song to the buffalo stone was one of the songs that was within the tape. That means that there was something real that was being recorded. Our people that I recognized, the voices—the names, that is; I did not know the people—but I recognized the names that presented songs, prayers, and talks within those tapes.

I believe that while our people today are very enthused, especially at this present time, that they should be given every opportunity, every chance to practice and to be able to carry out Indian way of life as far as religion is concerned, and other cultural societies that can be performed and still be kept within our tribes, within our respective reservations. Today, we have very few of our old-timers that still exist, at least with the Blackfeet people. And one of the reasons that it's very important that we have some of these items that are missing, or that are away from our people, come back to the reservations, come back to our people is because while these old-timers are still living that have the authority, they may be able to relay a message or may be able to show our young people and the people who are interested today in carrying out our Indian way of life, that they may show them how those ceremonies are conducted, or what that particular item stands for. This is very important to my people at this time.

This is why I'm very enthused about having a bill that may bring us back together as far as our Indian way of religion is concerned, our Indian way of recognizing our old-timers, how they have lived and the things that they have lived for and lived by.

I am sure there are enough today who are very enthused. I have, on the Blackfeet Reservation, our Blackfeet Community College, which is doing some things today to try to bring back the language, bring back our Indian way of gatherings. We have a lot of our young people today who are very enthused about these kinds of programs. But our old-timers, that still exist, need to be utilized; and those that are still taking place on our reservations as far as the ceremonies, such as the medicine lodge, sun dance, are of great value to those people that want to carry them on.

I am member of the Board of Trustees or Directors of Cody, Wyoming, the museum there. While I was there, they took me down into the basement and I looked through some of the displays. One of the displays, they showed a photograph of one of our old-timers; his name was Three Calves. He was holding—he was the man that took the lead and the keeper of what is called a "bear knife." There was a photograph that I took back to the family members.

Now, this bear knife does not exist on the reservation no longer. It's in the museum at Cody, WY. Now, if that particular Bear Knife Society item was back to the tribe, there are people that can show our young people—especially to the family members—what that meant and how it can be used, how it could still be used to conduct these ceremonies.

This is how important these items are to our people.

If I might say that our people, the people that I have conversed with—I used to be an interpreter for the Blackfeet people, back in the late 1940's and early 1950's—they talked about a group of Blackfeet that went east, they have never known where they went and they ended up. But it is a great saying—they used to say, this is the word they say—"iyamo," that is going east, this group of Blackfeet. And so that makes us to believe that something took place with these people. Perhaps they have never come back to our area, but we often wondered and people often wondered where they were and where they went.

And so, I guess today I am backing up—it is too numerous to bring out the kinds of things that makes us want these kinds of items and these kinds of things to come back to the reservations to our people, but I fully support this bill that is being presented. We are hoping that this will be a key in bringing back those things that our people are wanting, and to continue identifying and continuing to use them throughout the years so long as we exist, so long as we want to practice. There are still a lot of people that want to go on with what still exists today, and perhaps by bringing some of their things back we may be able to create and bring back other society gatherings that no longer are practiced on the reservation.

So with that, again, I want to say that I am very pleased and honored that I come and present our views and present our belief, and to present our plea in the passage of this bill, that it may help us.

I would like to ask Vicki if she has any additional words that she may want to present to you at this time.

[Prepared statement of Chief Old Person appears in the appendix.]

STATEMENT OF VICKI SANTANA, LEGAL COUNSEL, BLACKFEET TRIBAL COUNCIL, BROWNING, MT

Ms. SANTANA. The only thing I would like to add is, as an attorney, that I have tried to study the laws that this tribe, my tribe, has regarding the care and transfer of religious articles. I want to tell you that they are vastly more complex than even the IRS. This is not a simple thing that we do when we take back an object. We have many, many rules that have to do with the preparation. The rules have to do with the thoughts you can think while you are in the ceremony. Many rules having to do with the treatment of other people.

I just want for this committee to be aware of the fact that this is not something that any tribe would do lightly, taking back any religious object, that we are well aware of the responsibilities and the burdens upon us when we do these kinds of things. It is not a simple thing.

The CHAIRMAN. I thank both of you for your testimony. It will be extremely helpful as we proceed in our consideration of the bill.

Senator Melcher.

Senator MELCHER. Earl, are the societies in their religious practices the bulwark of the tribal and life?

Chief OLD PERSON. I didn't get that.

Senator MELCHER. Are the societies and the religious practices the bulwark of promoting family and tribal life?

Chief OLD PERSON. I think they are, very.

Senator MELCHER. Is it the feeling of the tribe that, as the religious practices die out, that the lack of attention of the younger members of the tribe to those ceremonies is harmful to them personally and to the tribe in general?

Chief OLD PERSON. We have people today that strongly believe that by losing that which they have, the ancestors they have had and have had given to them, it is harmful. I think in the early 1950's people were very reluctant—even in the late 1940's—to really practice their Indian way of religion because of the things that had happened to them by the governments, by the people that come and try to keep us from practicing our Indian way of gatherings, religious ceremonies. But in the early 1970's I saw where people became very strong, and they came on very strong, in their belief. That is why I believe you will see today that they have gone back to wearing their hair long, in braids, and dressing in their native way of life. It shows that they want to come back, and they want to retain—they want to bring back and live that life to the best that they can, to keep up that ritual, to keep up that religion because our way of life in those days—and hopefully, today—we escape to a spirit, hoping that they will give us that guidance and a way of life.

Senator **MELCHER**. Is that your personal belief?

Chief **OLD PERSON**. I believe it.

Senator **MELCHER**. Do you believe personally that the practice of these ceremonies is a spiritual practice necessary for yourself, and perhaps for others in the Blackfeet Tribe?

Chief **OLD PERSON**. I believe it. Let me give you one example. To those religious societies that still exist, mainly we use a group in Canada that still exists—one of the leading groups there is the Horn Society. Because some of the religious society groups that we have no longer except the Medicine Pipe, which is the leading religious group on my reservation, and very powerful—whenever there is sickness within a family, they make a vow that they will have the keeper of that bundle put on their medicine pipe ceremony for the survival of that individual. It's still going on today; that is why it is very important to many of our people that still believe in this way.

Senator **MELCHER**. Now, I know you, Earl Old Person, first as a young person. How long have you been chairman, total number of years, for the Blackfeet?

Chief **OLD PERSON**. Well, I've served on the Council since—I got on the Council back in 1954 and I've been on since. I've been the chairman since 1964, with the exception of 1 or 2 years.

Senator **MELCHER**. Since 1964?

Chief **OLD PERSON**. Yes.

Senator **MELCHER**. Been on since 1954, and——

Chief **OLD PERSON**. Chairman since 1964, and I was made the lifetime chief in 1978. So that gives me over 30 years of service.

Senator **MELCHER**. And you are lifetime chief since 1978, which is an additional recognition and entirely separate from being the tribal chairman?

Chief **OLD PERSON**. Right. Right.

Senator **MELCHER**. How do you propose to resolve the situation where there are claims made for religious sacred artifacts that perhaps are not valid?

Chief **OLD PERSON**. You mean, getting back——

Senator **MELCHER**. No; how do you separate the true claims of the tribe as opposed to some who might come forward and make a claim for a sacred artifact that really isn't a valid claim?

Chief **OLD PERSON**. I think It's really our Council, the leaders today, to make that decision.

Senator **MELCHER**. Can you establish authenticity?

Chief **OLD PERSON**. I'm sure we can establish—I think we have enough—we have another group other than the Tribal Council, that is the older group and the people that are members of societies, that can help in making decisions.

Senator **MELCHER**. Then what you're telling us, you believe that it should be the tribal council through resolution, identify authentically what you would like returned from a given place? For instance, from Cody, from that museum there?

Chief **OLD PERSON**. I believe they are the authorities, with the help of the people that have that background.

Senator **MELCHER**. All right. Thank you very much, Earl.

Chief **OLD PERSON**. Thank you.

The **CHAIRMAN**. Chief Old Person, I thank you very much, sir.

Chief OLD PERSON. Thank you.

The CHAIRMAN. Our next witness is Nelson Wallulatum, the traditional Chief of the Wasco Tribe of the Confederated Tribes of Warm Springs. Chief Wallulatum will speak in behalf of the affiliated Tribes of Northwest Indians.

Chief Wallulatum, welcome to the committee, sir. We will be pleased and honored to receive your testimony.

STATEMENT OF CHIEF NELSON WALLULATUM, CHIEF, WASCO TRIBE AND TRIBAL COUNCIL MEMBER, CONFEDERATED TRIBES OF WARM SPRINGS, REPRESENTING THE AFFILIATED TRIBES OF NORTHWEST INDIANS, PORTLAND, OR

Chief WALLULATUM. Thank you, Mr. Chairman, members of the committee. I have a prepared statement that I will read; and then if there are any questions after that, I can answer those.

The CHAIRMAN. Please proceed.

Chief WALLULATUM. I will try to go through it as quickly as I can because I have a limited time.

My name is Nelson Wallulatum. I am Chief of the Wasco Tribe, one of the three tribes making up the Confederated Tribes of the Warm Springs Reservation of Oregon. With me is Delbert Frank of the Warm Springs Tribe, a fellow tribal council member, who is the vice chairman of the Mid-Oregon Historical Society.

We are here to express support for S. 187, the Native American Cultural Preservation Act.

I would like to give you some idea why the protection of human remains and sacred objects is especially important to the Indian people. We, like you, have a natural human reaction when the remains of our ancestors are removed and studied. You should remember that some of the remains that we are talking about may be less than 100 years old. You can imagine your dismay if Thomas Jefferson's bones were removed from his grave and displayed on a museum shelf. You would even feel more strongly if he were your great-grandfather. Many of the remains now held by the Smithsonian are my relatives or the relatives of my people, and as Chief of the Wasco Tribe and as a community religious leader, they are my direct responsibility.

Apart from this universal reaction, Indian people have some special beliefs that make this issue important to us. All tribes have ceremonies for the deceased at the time of death. The ceremonies are of a religious nature and are normally carried on continuously for a period of several days. Within the tribes there are only certain persons who are permitted to handle the bodies of the deceased. Those are people who have the necessary religious attributes. This is so because the bodies must be handled properly in preparing them to make the journey to their Creator. One aspect of the ritual is the dressing ceremony. In this ceremony, the last bath is given to the deceased in the evening, and the deceased is dressed in pure material that has not been soiled or used, since they would be worn when the deceased met the Creator.

Even after the funeral ceremony is completed, the tribes still believe that the deceased person remains a part of the living. Because there is an on-going relationship with the deceased, the tribes retain an interest in the remains of the deceased. The tribes attempt to physically keep their people, both living and deceased, together. It is common for tribes to remove the remains of their people to a common area so that the tribe can remain together. When the remains are removed, the same religious rituals are observed. For example, the remains of the deceased will again be dressed in pure materials for their removal, even if there are only a few bones left. Again, only those religious leaders who are qualified may handle the remains at the ceremonies.

For example, recently the remains of Jake Thomas, a Wasco scout who died in Yakima, WA, about 100 years ago, were removed to the Warm Springs Reservation. He served as a scout for the United States and was regarded as a great warrior by the Wasco people. Although Jake Thomas' remains were of relatively recent origin, the mere passage of time does not decrease the responsibility that the tribe feels toward the deceased.

Several years ago, the remains of our ancestors were found at an archaeological site in Oregon and were returned to be with our people. The same religious ceremonies were used for the remains of these people, who died 600 or 700 years ago, as would be used for those people who had died 10 years ago. This excavation and eventual reinterment were done with close cooperation between the tribes and archaeologists. Oregon law carefully protects the tribes when archaeological excavations are involved; however, they do not give us assistance when the remains or sacred objects are in the hands of the Smithsonian Institution or other museums.

Sacred objects are often found with human remains and are also given special treatment. These artifacts, such as spear points, stone tools, and beads, are often artifacts that were given to the deceased to equip him or her for their journey to meet the Creator. It is also important that these artifacts are handled correctly.

We understand that there are competing scientific interests that will be considered by Congress. For the most part, we believe that the religious and social interests to be protected are of far greater importance. Certainly, important scientific information could be obtained from the excavation of a colonial cemetery in Boston, probably even more than by excavating the more recent remains of my ancestors. However, no archaeologist would consider making such a proposal.

We believe that legislation such as that before you today is a step in the right direction to give Indian remains and sacred objects the respect which is their due.

Thank you.

[Prepared statement of Chief Wallulatum appears in the appendix.]

The **Chairman**. I thank you very much, Chief Wallulatum. This committee will most certainly do our best to give Indian remains and sacred objects the respect which is their due.

I wish to now call upon the author of the measure, Senator Melcher.

Senator **Melcher**. Nelson, do the religious beliefs that we've been describing and the ceremonies that go with that of the Blackfeet and the Northern Cheyenne, as typical of the plains tribes—is there any similarity to the northwest tribes in those religious beliefs and ceremonies?

Chief **Wallulatum**. I believe that in the Northwest it is a common practice that most tribes use, although before contact with the non-Indian, which was 1792 when Captain Gray came into the mouth of the Columbia River, our people were slavers. We had slaves and we had different rituals at that time which were different from most of the Northwest because we had sacrifices when a person of great importance was deceased. But today we have toned down those ceremonies to where we pay the great respect. It takes about three days in the beginning; but because of economics and the laws of the State, we have more or less come down to one day. But under the Indian Religious Freedom Act, our belief is—our people are interred with their blood. So this is another reason why we have kind of toned down the time to one day. But we still carry on the 1-year rituals that will follow through until the name is put away. After a year we have ceremonies to where the name comes back out and then is available to some younger person then. Then, we had a practice of putting the family together, in years back, where we dug up the whole family and put them into one common grave. And then, in the seeded area, we have the U.S. Forest Service and Bureau of Land Management and the State of Oregon who respect our religious ways under—I don't know whether it's still a law yet, the National Historic Preservation Act. They would inform us when they discovered something, a development, in their forestry work—if they discovered something they'd advise us, and then we'd go to see if they would be saved right where they're at, and if not, then we bring them back to the reservation. This goes to the same ceremonies, again.

At this time I think that the northwest, yes, carries out almost the same kind of beliefs. The objects, we classify the same as the remains because most of them are artifacts or antiquities that are found in the cemeteries.

Senator **Melcher**. Found with the grave?

Chief **Wallulatum**. Yes.

Senator **Melcher**. All right. Thank you.

The **Chairman**. Thank you very much. Senator Evans.

Chief **Wallulatum** [continuing]. I had one more thing. We do have information and cataloged numbers and all this from the Smithsonian. Out of 514, more or less, 311 are identified as from our people out of that 514.

The **Chairman**. Thank you very much. Senator Evans.

Senator **Evans**. Thank you very much.

Chief, before you proceed, I would like to take this opportunity to welcome you to this committee and to say that I am delighted with the work that your tribe did with us in the development of the Columbia Gorge bill of the last Congress. Now we have the opportunity to help carry it out. I think it turned out to be a better bill, and we will end up with better management with the assistance and the cooperation that we received from you during its development.

The description of the term, "skeletal remains in this bill," is relatively easy, I suppose. But "sacred artifact" is more troubling. Could you give me a better idea of where is the dividing line? For instance, many museums commonly to have displays of headdresses, of costumes that were used during dance performances, and of a wide variety of utensils and carved wooden objects. What is the range that you would say are included with "sacred artifacts"? What sort of articles would be outside of that and be considered more common archaeological remains?

Chief **Wallulatum**. Senator Evans, we look on the artifacts as sacred. If they are found on the ground that are campgrounds or whatever—and we look to these as sacred grounds, so the artifacts that some people pick up, like arrowheads and those things—well, the wooden things we don't have hardly, any more. But we still look on some of those as very sacred and we try to leave them where they are at to identify a campground.

The significance is in the common sense of our people trying to find the link between us and our ancestors from 10,000 years back that had occupied the areas. So we have committed ourselves to saying that we want the remains definitely returned; but if you can study some of the artifacts and assist us in finding that link between the ancient and the present, we will be flexible to allowing that. But at some time, we want them back.

Senator **Evans**. Sure.

Many of the artifacts that I've seen in museum collections, especially in the northwest, tend to relate to or be involved with traditional dances and similar ceremonies, the very ornate, carved wooden headdresses of many of the Northwest tribes. Would those generally have been dances and ceremonies connected with religious activities, and thus come under sacred artifacts? Or were they more generally either social or for pleasure or for whatever purposes the tribe engaged in?

Chief **Wallulatum**. I guess I would have to say that, in the beginning, precontact and contact and up to present, we still believed and were controlled by religion. One of the few governments that is different than the Constitution, you know, separation of religion and State. Well, our governments were controlled by religion, so the masks and the figureheads on our canoes and basketry, our cornhusk bags or whatever usually always showed some religious significance to it, so the designs were to show that we, as a part of mother earth, communicated through these objects to identify ourselves religiously as being created from the dirt and ashes. We still today believe that, and we worship one Creator.

Senator **Evans**. It seems to me, Mr. Chairman, that that means that the description of "religious artifacts," then, could very well be a very broad array of elements and would cause us, if this bill is adopted, to make sure that we would have to implement it with sufficient money and sufficient staff, sufficient support to really encompass what probably is a larger array of concerns than may have been apparent in the beginning.

The **Chairman**. I think this matter deserves and will be given the fullest consideration and study.

Thank you very much, Chief Wallulatum.

Our next witness is the Director of the United South and Eastern Tribes, Mr. Lionel John, the former tribal chairman of the Seneca Nation. Welcome to the committee, Mr. John.

STATEMENT OF LIONEL JOHN, DIRECTOR, UNITED SOUTH AND EASTERN TRIBES, NASHVILLE, TN

Mr. JOHN. Good morning, Mr. Chairman, members of the committee, staff. It gives me pleasure being here this morning to address your proposed legislation, S. 187.

I have a written statement that I will submit for the record.

The CHAIRMAN. Without objection, your prepared statement will be inserted in the record immediately following your oral presentation.

Mr. JOHN. I would like to make some oral comments on some key issues that affect some of the tribes here in the east.

One concern that was expressed in a recent meeting that we had of the United South and Eastern Tribal Organization was the issue of the States. There are two aspects to this. In one instance, the Porch Creek of Alabama were concerned that there are a number of people who are struggling for identity as Indian peoples, who are apparently making claims to some remains and artifacts, and may not necessarily possess the credentials for such claims. That seems to cause a bit of conflict with the tribes that can clearly demonstrate that they possess the ownership.

There was another concern regarding the States which I experienced personally. A little over a year ago the State of New York was moving to enact legislation which would give itself the right to go in and move graves or do anything it wished in the name of development for highways or buildings or whatever it wanted, without regard to the Indian concern. We gathered, as leaders of New York State tribes, and went to the capitol; and at the time, I persuaded them not to move forward with this legislation.

That kind of activity could probably resurface, and probably will resurface; maybe not only in New York State, but in other States. Therefore, we think there is legislation from a Federal perspective that is necessary to prevent individual States from enacting legislation of their own for their own purposes that are inconsistent with each other and with the wants and needs of Indian people.

We did have some concerns with other segments of the proposed legislation. The issue concerning the artifacts was important to the eastern tribes, and it kind of couples with the issue of beliefs.

I come from New York State, a member of the Seneca Tribe. We are a member of the Iroquois Confederacy which consists of six tribes, which are the Mohawk, the Onondaga, the Oneida, the Tuscarora, the Tonawanda Band, the Seneca, and the Seneca Nation. In the Iroquois Confederacy we practice a belief—our spiritual belief—which is somewhat akin, in some respects, to Christianity. Where in Christianity people believe in God and they believe that they will go to Heaven someday, or otherwise, in our belief we have a system where, upon death, the spirit lives. This becomes terribly important in regards to skeletal remains, the disturbance of graves and artifacts, because as the spirit is disturbed with our people it generally is regarded as an omen of ill will, that something terrible happens within our people. That is a very sacred occurrence.

So anytime there is a disturbance of graves of the remains of our peoples, it's a bad thing for our people and we generally have to conduct ceremonies to ward off the ill will that is effected from this. This belief is practiced quite widely in the Iroquois Confederacy, and it's a strong belief in that the people of this country, of this world, in their darkest hours, when life is bad in many respects, generally call on their faiths. When there is a problem and something has gone wrong with any person, generally a person resorts to a prayer. They pray to God for help, for guidance, assistance. Our Indian people also resort to their beliefs and call on the strength of their belief in their darkest hours.

So these things all tie together and are very important and necessary. With the removal of a lot of Indian artifacts, of Indian remains, with the needs of the societies of the museums, the archaeologists, the anthropologists, those folks have sincere interest and often work in the name of science. We understand what that interest represents. However, we feel that it is of such a nature that if such legislation is proposed, we think that perhaps one thing that should be foremost is that the Indian people be afforded the first opportunity to make the determination of what shall be done with any artifacts or remains, and that they should decide whether or not there is anything should be turned over to a museum.

The Indian people themselves know, to a large degree, what is sacred and what can be displayed. It must be determined at that level as to what will happen.

There is a situation in this country where we practice, I believe, among all American people—a belief that we have is our honor system. Over across the river, in Arlington, we pay great respect and tribute to missing soldiers, to people who have served the country in one way or another, and there is a lot of respect and honor bestowed on the dead. We would like to see a commission where the honor can be shared and enjoyed by all peoples. We practice such things as saluting a flag; we pledge allegiance, we do a number of things that express honor, and we would like to have that honor shared so that all people can enjoy it in their own respective manners.

With that, I thank you for this opportunity to come before you this morning, and if you have any questions I would try to answer them.

[Prepared statement of Mr. John appears in the appendix.]

The CHAIRMAN. Thank you very much, Mr. John. Your concerns will be given the most serious consideration.

Senator Melcher?

Senator MELCHER. Lionel, how do you determine whether somebody is an authentic religious leader?

Mr. JOHN. The tribes themselves know that. There have been questions, I know, in some instances whether someone is an authority or proper religious person or something, but the tribes themselves know that, and they must be consulted.

Senator MELCHER. Are you qualified to speak on that, to assert that?

Mr. JOHN. I am a follower of our tribal faith. I am not qualified as a faith keeper or speaker. In my family, we have that qualification; my uncle is one of the speakers of our religion in my reservation.

Senator MELCHER. You were a former chairman of the Seneca?

Mr. **John**. Yes.

Senator **Melcher**. That does not necessarily qualify you, though, to speak on behalf of the Seneca on this matter? You're not the highest authority, in other words, on what would be a religious artifact or establishing authenticity?

Mr. **John**. In the Seneca system it differs, perhaps, from other tribes in that Seneca chose in 1848 to adopt a democratic form of government, which seceded from the chieftain form of government of the Iroquois Confederacy. At that point in time there was a split between the religious order and a political order of the tribe. Even though previously I was from the traditional side, I chose to go to the political side; so in that process I had to share the authority with the people from the religious order. But that's unique to the Seneca; it probably differs from tribe to tribe.

Senator **Melcher**. Now you—well, having followed—that was 1848, that split occurred?

Mr. **John**. Yes.

Senator **Melcher**. Well, following that political side of the split, you retained your religious feeling and cultural beliefs? Is that true?

Mr. **John**. Yes.

Senator **Melcher**. Well, then, Earl Old Person, representing the Blackfeet earlier, said that the proper way to prove authenticity was through actions of a tribal council in consultations with the religious leaders of the tribe.

Mr. **John**. As I represented, I think the tribe needs to be consolidated. And I said the tribe will identify who their authorities are. It will vary across the country, from one tribe to another.

Senator **Melcher**. How many tribes do you represent in speaking here today?

Mr. **John**. I represent 16 federally-recognized tribes in the Eastern United States.

Senator **Melcher**. You represent 16 tribes?

Mr. **John**. That's right.

Senator **Melcher**. From north to south?

Mr. **John**. That's right.

Senator **Melcher**. Are you familiar with the court case recently decided by the First Circuit Court of Appeals this year where the ruling was that if the Federal Government could not establish clear title to skeletons and associated grave goods, then they would be returned to the tribe?

Mr. **John**. No, sir; I'm not totally familiar with that.

Senator **Melcher**. This is the first ruling that I'm aware of by the Circuit Court of Appeals. What we hoped to do in establishing the bill was to provide a mechanism where you wouldn't have to go to court, to have a mechanism—a decision—other than through each case going to court.

If this whole process would take 20 years to unravel, would that surprise you?

Mr. **John**. No; it wouldn't.

Senator **Melcher**. That's about the Indian people anticipate, is a fairly lengthy process and one of establishing proof for ownership. Is that correct?

Mr. JOHN. I think so. It took us a few hundred years to get this far, and I think it will take considerable time to take it back.

Senator MELCHER. Part of the bill goes into a Native American Center to exchange cultural information and also to provide the opportunity for Indian people to be trained and educated in the procedures of preservation of cultural objects; also, to provide information to the rest of us on what those cultural objects are and what the significance is. What do you think of that portion of the bill?

Mr. JOHN. I think it's a good feature. I think that we need to proceed in that manner. It may help address the situation we have; if you will, there seems to be some conflict between the traditional Indian factions and the museums and archaeologists and those folks. And there probably is a need for some middle ground, and perhaps I might begin to develop that middle ground that we need.

Senator MELCHER. Over a period of time?

Mr. JOHN. Right.

Senator MELCHER. Do highly-educated Native Americans, including not just bachelors degrees and masters degrees but doctorate degrees, do they have the same feeling that you do about this? Or does it just sort of dribble off after they become highly educated?

Mr. JOHN. It varies among people. There are some that carry their feelings. I know at Seneca we have a doctorate that's in charge of our travel museum. But it does vary, and perhaps the reason that we have a variance is because of a process that affected Indian people in that a policy existed in our past, which I've called the "assimilation policy," and there are two aspects of that. It was mentioned earlier that people were dissuaded from practicing their traditional beliefs. I have an aunt that's 88 years old that told me about how she was taken to a Quaker school and punished for speaking her native language and practicing her ways. That assimilation process has worked to a large degree.

The second part of that assimilation process is a natural process where there are Indian people residing in densely-populated areas with other races, that there are certain numbers of intermarriages occurring; and subsequently, the offspring are less Indian. Through that process, the people lose their ties and lose their understanding and feeling of the traditional values.

Senator MELCHER. All right. Thank you very much, Lionel.

The CHAIRMAN. Senator Evans.

Senator EVANS. No questions.

The CHAIRMAN. Senator Daschle.

Senator DASCHLE. I only would ask, just in concept—as I understand it, the National Congress has expressed some opposition to the concept of arbitration, believing that with arbitration you relegate the whole question of the dispute, and that isn't something that they believe ought to be relegated; that the question of property rights in this regard primarily are negotiable.

Do you think that is a view held by the majority of the people? How would you see the question of arbitration as we consider it in this bill?

Mr. JOHN. It's a difficult issue. I cannot or will not speak for the National Congress. They are here, as a matter of fact, but the issue within itself is one that's complex. The most traditional of people—and I can speak of the Iroquois people, for example—will oppose that issue fairly strongly in that they believe that there is no compromise, that all remains and artifacts must be returned to the tribes. You will find in different circles, in different parts of the country, more moderate opinions, and some folks will agree to a form of a compromise.

I think you will find that fluctuates across the country.

Senator DASCHLE. Would you be willing to offer your best guess as to what is the majority-held view on this issue?

Mr. JOHN. It would certainly be a guess. I really don't have a qualified answer for that. I don't know that we've measured the degree of concern.

Senator DASCHLE. Then your guess is what?

Mr. JOHN. I would guess that the majority of the people would be concerned that the Indians have the priority.

Senator DASCHLE. They are more satisfied to go through this process that Senator Melcher has described, a long process of litigation to maintain the establishment of that right rather than to subject themselves to an arbitration panel, even if it is, perhaps, more of a conducive panel with regard to the final decision?

Mr. JOHN. I think that might be the case.

Senator DASCHLE. Thank you.

Thank you, Mr. Chairman.

Senator MELCHER. Mr. Chairman?

The CHAIRMAN. Senator Melcher.

Senator MELCHER. Lionel, based on property rights would it be your opinion that a commission, formed something like the Indian Claims Commission, should be formed in this case and should have the authority to determine authenticity and validity of claims of the various tribes or bands?

Mr. JOHN. That would be possibly a mechanism that could be used. I don't know that we know what the right way would be today, but I think that we have to start someplace.

Senator MELCHER. We have to start with a procedure somehow?

Mr. JOHN. Yes.

Senator MELCHER. OK. Thank you.

The CHAIRMAN. Senator Evans.

Senator EVANS. Let me pose a theoretical situation to see if we can describe more accurately what we're really talking about when we talk, again, about "religious artifacts".

I would guess that in all religions of the world, as times change, so do people's view of what really constitutes a religious artifact or something associated with the practice of a particular religion. In your view, which should be the determining factor? For instance, 100 years ago or at some previous time, there may well have been a trade or a sale of an artifact to a member of an Indian tribe to someone else, a non-Indian, and that eventually found its way into a museum. At the time of the trade it may not have been viewed by the people of that time as a religious artifact. Under current standards and current views of the same tribal leadership, they may feel that that sort of thing is a religious artifact. Which view should prevail? Should it be the view of that artifact as of the time it was created or was in existence or was sold from the tribe or taken from the tribe? Or should it be today's view of whether that is or isn't a religious artifact?

Mr. JOHN. My own personal opinion in this is, I think it should be the view of the tribe. As I said earlier, there is a division among Indian people caused by such factors as assimilation, some of the things that have gone on. There are people in the Indian tribes today that don't understand the beliefs of the tribes because of the circumstance. There are also, sometimes, people who are unscrupulous who will go out for personal gain and try to make some money selling things. That doesn't necessarily represent what is right, and I think that the real traditional people would prevail in this situation.

Senator EVANS. I do understand the situation where an unscrupulous person may have stolen or taken without any compensation an artifact. My concern is where the transfer was made on what appeared at the time to be a purely rational basis; maybe the tribe collectively, or an individual in the tribe had created something, made a particular artifact, and had sold it or traded it to someone else and that found its way into a museum. In this situation, which view of that artifact as a religious artifact should hold: the view of the people at the time it was created, or the view of the tribal leadership today? They may be differing views. It may be viewed today as a religious artifact, but not at that time; it may be viewed today as not being a religious artifact, but in truth was viewed that way at the time it was created. Should it be the current view or, as nearly as we can understand it, the view of the people at the time the artifact was made?

Mr. JOHN. That can vary because of a number of circumstances, again. In some instances there are impostors, if you will, people who will go and carve a mask, for example, that could be a very sacred item, and will sell it. That is a misrepresentation and shouldn't even be regarded, but that happens.

I don't think that, in any event, we can deviate from the principles and that the view should be whichever relates to the traditional value of the tribe, of the Indian people.

Senator EVANS. Is that continuous? Is there a continuity to this? You mentioned 1848, but isn't that continuity even much older than 1848?

Mr. JOHN. Oh, yes.

Senator EVANS. It was carried on?

Mr. JOHN. The Iroquois Confederacy that I speak of dates back before colonization.

Senator EVANS. Then is it still the same as it was?

Mr. JOHN. Pretty much the same, yes.

Senator EVANS. So it isn't created—it's something—it isn't created new; it's something that is old, and it's traditional, and has a continuity going back into the roots of the Iroquois?

Mr. JOHN. That's right.

Senator EVANS. Thank you.

The CHAIRMAN. All right. Thank you very much, sir.

Mr. JOHN. OK. Thank you.

The CHAIRMAN. We have received a statement from Ms. Susan Shown Harjo, representing the National Congress of American Indians, and another from Mr. Steven Moore, Walter Echo-Hawk, and Mr. Henry Sockbeson, representing the Native American

Rights Fund. These two statements with their attachments will be made part of the record.

[Material referred to appears in the appendix.]

The **Chairman**. Our next witness is the Acting Executive Director of the Advisory Council on Historic Preservation, Mr. John Fowler.

STATEMENT OF JOHN FOWLER, ACTING EXECUTIVE DIRECTOR, ADVISORY COUNCIL ON HISTORIC PRESERVATION, WASHINGTON, DC.

Mr. **Fowler**. Thank you, Mr. Chairman. It is a pleasure to testify before this committee on behalf of the council. I am accompanied today by Thomas King, the director of the Council's Office of Cultural Resource Preservation, and our senior archaeologist. Chairman Baker, who resides in Denver, regrets that she was unable to attend this hearing; we have submitted her statement for the record. I would like to summarize that statement and add some additional views.

The **Chairman**. Without objection, the prepared statement will appear in the record immediately following your oral presentation.

Mr. **Fowler**. Thank you, sir. I will add some additional views from our experience with similar problems to the kind that S. 187 is attempting to address.

I should note at the outset that the Council has taken no formal position on this legislation. The Advisory Council is a unique organization in the Federal Government, established by the National Historic Preservation Act of 1966. It is composed of six Federal agency heads, the Architect of the Capitol, a Governor, a mayor, the chairman of the National Trust for Historic Preservation, the president of the National Conference of State Historic Preservation Officers, four experts from the private sector in historic preservation, and four general public members. So we present a unique perspective on historic preservation problems as a Federal agency, but with one foot firmly entrenched in the private sector.

Our principal functions are to advise the President and Congress on historic preservation matters and to conduct a project review process under section 106 of the National Historic Preservation Act. The Council meets on a quarterly basis. Our next Council meeting is scheduled for late March; at that time we will have S. 187 before the Council membership, and we hope that we will be able to provide you with the specific position of the Council membership on the bill following that meeting.

Section 106 of the National Historic Preservation Act is the Council's principal business. It requires Federal agencies to take into account the effect of their undertakings on historic properties, then to afford the Advisory Council a reasonable opportunity to comment. We have implemented the statutory requirements in regulations that set up an administrative process that involves consultation among Federal project managers, State historic preservation officers, and the Council staff. We involve the public. We have made recent amendments to our regulations to have greater public involvement, and specifically, greater involvement of the Native American community and established Indian tribes.

Each year we handle about 1,500 cases where there are Federal actions or Federally-assisted actions, such as highways, dam construction, Forest Service and BLM, management activities, and so on that involve possible conflicts between Federal conflicts and historic preservation values. Many of these cases, particularly in the west and on public lands, involve potential conflicts between Federal project needs and traditional cultural values of Native Americans. Quite often we are confronted with situations where the disposition of human remains and artifacts associated with them are questions that are dealt with in the section 106 process.

So the Council is very sensitive to this particular issue and has really first-hand experience with the conflicts between the scientific needs of the archaeological community in the study of these artifacts and remains, and respect for very dearly and deeply held cultural and religious interests by Native Americans.

I should emphasize for the committee's knowledge that we have not dealt with the question of repatriation of artifacts and remains that are in museum collections presently. Where we have our experience is determining what to do when, as a result of a Federal project, remains are going to be exhumed? And what is to be the disposition of them then?

For resolving these problems on a daily basis, we use the consultation process of section 106. We usually come up with what I think are acceptable compromise solutions between the competing interests. But I think it's important to note that we've found the absence of any clear national policy, any statement in any Federal legislation or preservation laws, to hinder the ability of the Council to reach successful solutions on a daily basis.

Last year we completed an assessment of the National Historic Preservation Act, which is the foundation of the National Historic Preservation Program. That act was put into place in 1966 and, on the occasion of its 20th anniversary, the Council completed an assessment of its achievements and its shortcomings. We had a specific section in that assessment on the question of Native American participation in the national preservation program. That section has been included as part of Chairman Baker's statement for the record.

One of the specific issues that we dealt with in the assessment was the question of the provisions in the Archaeological Resource Protection Act and their inflexibility, from our point of view, on the treatment of reburial of human remains. The Council reached no specific consensus on particular amendments that should be made to ARPA, but they did acknowledge that there is a need to make ARPA more flexible to deal with this issue of reburial.

In summary, while I need to stress that the Council has taken no formal action on S. 187, certainly the parts of S. 187 that deal with ARPA appear to be consistent with views that the Council has previously articulated. It allows flexibility and it provides a role for Native Americans that is not currently there.

I'd like to make a few further observations based on our experience with the 106 process and the treatment of human remains and related artifacts. The basic concept of the section 106 process is consultation and negotiation to resolve conflicting needs and expectations in Federal projects when they conflict with historic preservation values. We believe that the concept of negotiation and consultation has served us well, and we think it's a model that is worth considering as you move forward with the subject matter of S. 187.

I will speak from my knowledge of the Council and their general tendencies to say that I think that they will resist the notion of creating new Federal bodies to deal with this area, and I would urge the committee to consider looking more closely at existing Federal bodies to see if some of these objectives can be achieved through existing mechanisms.

As a final note, one of the serious problems that the Secretary of the Interior has personally recognized and the Council is fully aware of through its assessment of the preservation act is the inadequacy of ARPA and other Federal protections to deal with pot hunting on Federal lands. And while this is not specifically the topic of S. 187, it may be worthy of your consideration as you move forward with this.

We look forward to working with the committee, to sharing the Council's views with you as you go forward with this legislation, and we thank you for this opportunity to testify.

[Prepared statement of Ms. Baker appears in the appendix.]

The CHAIRMAN. Thank you very much, sir.

You just indicated that, in the event a Federal project finds it necessary to go through a burial ground and skeletal remains and artifacts are disturbed from such burial ground, that your agency would step in to determine the resolution as to where these remains and artifacts should go, to the scientific community or to those who have title to it.

Would you do the same thing if the Federal project had to go through a Quaker burial ground?

Mr. FOWLER. Our concern is if the Federal project affects historic values. "Historic" includes cultural and archaeological values. Maybe I can ask Dr. King to give you some examples of how we handle that. I think we have dealt with non-Native American burials in the section 106 process, a case in Georgia that he can speak to.

Mr. KING. Thank you.

Mr. Chairman, first I should say that we really don't step in to determine what happens to the remains; we step in to try to develop consultation among the parties to reach a determination about what will happen that's mutually agreeable. One example that Mr. Fowler alluded to was a case recently in Georgia involving expansion of the Metropolitan Atlanta Rapid Transit system, a project assisted by UMTA, which would take out a cemetery containing the remains of both black and white residents of the area from before and after the Civil War. In that case, the agreement that eventually was worked out provided for the careful archaeological excavation of the remains, their scientific study on-site in accordance with State law, and their reinterment at another location.

In a case dealing with American Indian remains in California that we are only now concluding, we have a very similar sort of arrangement. In this case, the cemetery is being taken out by a flood control project requiring a Corps of Engineers permit. The agreement that has been reached provides for the archaeological excavation of the remains, their scientific examination and analysis, and then reburial in accordance with the wishes of the two local Indian communities that are related to the people in the ground, in land that's being turned over by the flood control district to the Indian communities. We try to be very even-handed in these matters.

The CHAIRMAN. So your agency does recognize that title in these remains are with the Indian people?

Mr. KING. I don't think the Council has ever reached a position on to whom title belongs. What's recognized is that there is a legitimate cultural interest in the remains, and there is also a legitimate scientific interest in the remains that is held by the archaeological community. We seek balance between those two interests.

The CHAIRMAN. Then would you believe that the Indian people have a legitimate cultural interest in skeletal remains that are now resting in shelves and boxes at the Smithsonian?

Mr. KING. Well, I'd have to distinguish the position, again, of the Council and the position of myself as staff. The Council has not reached a position on that question and has not ever really had to address it. Personally, I would say certainly, they have that interest.

The CHAIRMAN. As far as your archaeological investigations are concerned, they are made on-site?

Mr. KING. Well, archaeological investigations, sort of by definition, are made on-site. Analysis of the remains removed from the site may take place on-site—some must take place on site; others must take place, or usually do take place, in laboratories elsewhere.

The CHAIRMAN. But these laboratories do not hold remains for 100 years, do they?

Mr. KING. Pardon me?

The CHAIRMAN. Do they retain possession of the remains for more than 100 years?

Mr. KING. Well, Mr. Chairman, those laboratories that have been in existence for over 100 years certainly have, in many cases, held on to them.

The CHAIRMAN. How long do you think these remains should be held by these laboratories for investigations?

Mr. KING. Mr. Chairman, in the agreements that we try to reach on these subjects, we try to establish a certain date by which time the bones will be put back in the ground. But that varies——

The CHAIRMAN. Well, what is a reasonable time?

Mr. KING. Well, it varies from circumstance to circumstance. One recent case in Illinois involved a 1-year analysis period before the bones were reinterred. There's been another case in which, in fact, we were not directly involved, concerning bones from North Dakota in which, I believe, 3 years were allowed under State law.

The CHAIRMAN. What is the longest period?

Mr. KING. I frankly don't know what the longest period has been under an agreement that we have executed. I'd have to research that.

The CHAIRMAN. Do you know of any beyond 3 years?

Mr. KING. Well, in terms of an agreement per se, no. I am certainly aware that bones have been held as the result of Federal projects and other activities that have resulted in exhumations for decades, or conceivably, centuries. But there was no specific agreement.

Frankly, in prior years, the Council didn't really recognize the need for a specific agreement as to the date and time that analysis would be permitted. This is something that we've become more sensitive to in recent years, and——

The CHAIRMAN. I am not an archaeological scientist but I gather that you are.

Mr. KING. Correct.

The CHAIRMAN. What is a reasonable time period for an archaeological scientist to conduct investigations on skeletal remains?

Mr. KING. First, I should say that it's not only archaeologists that look at skeletal remains. It's also physical anthropologists, who are specialists in this particular area of investigation.

The CHAIRMAN. Well, let's include them, also.

Mr. KING. All right. I should then say that I don't know that I'm altogether qualified to speak for the physical anthropologists, and I think you will have people testifying later who are better qualified to do that.

I would say for myself only that the length of time varies, depending on the research questions that are being asked of the remains, the nature of the remains themselves, the condition they're in, the age of the remains, and the kinds of tests—kinds of analyses—that can be performed, which then is a function of the nature of existing technology. The technology available for examination of human remains or anything else is changing constantly, and presumably one can become more efficient as the technology improves, and thus reduce the times. So I would be extremely reluctant to try to set an arbitrary time—a universally-applicable, arbitrary time—for analysis. I think that's something that has to be worked out on a case-by-case basis.

The CHAIRMAN. Most of the skeletal remains that this bill concerns itself with are remains that were acquired by museums through various means during the past 130 years. We're not talking about remains from the Neanderthal period or Mesozoic period; we're talking about the rather recent past. I can understand if, in your diggings, carbon testing showed that these were from some period 2,000 years ago; but we're talking about 100 years ago, 50 years ago.

Mr. KING. Well, Mr. Chairman, the examples given early on by Senator Melcher were certainly of remains obtained from very recent times, literally dug out of the grave as—practically before the flesh was cold. I don't think that it necessarily follows that the bill pertains only to extremely recent remains. As I read the bill, it would apply at least to any remains to which an Indian tribe could make a plausible claim of cultural ancestry or descent. Certainly, in my experience as an archaeologist that period of time can extend back 2,000 years, and——

The CHAIRMAN. I'm well aware of that, sir. But if we're dealing with remains of the last 100 years, what is a reasonable time for archaeologists to investigate?

Mr. KING. Well, I think it's common practice to do a very abbreviated analysis on remains that are that recent. I think 1 year would probably be a fair baseline figure. In many cases it's much more abbreviated than that for remains that are more recent. Archaeologists are not insensitive to the feelings of living descendants of the people who are interred, and basically, the closer you get to living people, the more abbreviated the studies are.

The CHAIRMAN. I thank you very much.

Senator Melcher?

Senator MELCHER. Mr. Fowler, the creation of the council by law gave you a definite function, and it seems to be working. And while we're certainly interested in the council's attitude and recommendations on this bill, a great deal of what the council is demonstrating in its month after month of work, and continuous work, is that however we here in Congress would like to avoid creating different groups to resolve problems, nevertheless the council is proving that effectively it serves the public interest in resolving the issues on archaeological findings in Federal projects. I want to commend you for that, and commend the rest of the council for that.

Mr. FOWLER. Thank you, sir. I'll extend that to each of the members of the council.

Senator MELCHER. Mr. King, as an archaeologist, the point that we're dealing with on much of the matter that this bill would seek to address is not something that's going to be unearthed; it deals with items already residing in a museum. Now, is there a necessity to have a procedure to address these matters, whether—well, first of all, skeletal remains—in your judgment, that is, as an archaeologist?

Mr. KING. Senator, do you mean——

Senator MELCHER. It is necessary, do you believe, to address these matters? The matters being, for the moment, skeletal remains that are in museums. As an archaeologist, what's your opinion on that? What's your judgment?

Mr. KING. Well, my judgment, Senator, is yes, there certainly is. In working with the problems of exhuming and reinterring remains today we are constantly in touch with Indian groups who express at least equal concern about the remains that are in museums. So clearly, the problem is there and there is now no structured mechanism except for litigation to——

Senator MELCHER. Except for what?

Mr. KING. Litigation.

Senator MELCHER. Litigation?

Mr. KING. Yes; outside the courts, there is no real mechanism for dealing with it on a comprehensive basis.

Senator MELCHER. Well, can I interpret that answer to say that you believe that a bill, a law is necessary?

Mr. KING. Well, again, I do, yes. Again, I'm not speaking for the Advisory Council——

Senator MELCHER. I understand. I understand it's you, as an individual archaeologist.

Mr. KING. Yes; as an individual archaeologist. Yes; certainly, I believe a bill is necessary to take care of the situation.

Senator MELCHER. Now, what about Indian artifacts? How difficult is it? It is a big job, isn't it, to sort out artifacts and say which ones have sacred connotation, and therefore somebody might own them or might be better off having them than the museum? That is a big job, isn't it?

Mr. King. I would certainly agree with that, Senator. That is a big job.

Senator Melcher. Do you think it's necessary?

Mr. King. Oh, yes; I think it's necessary.

Senator Melcher. You think it's necessary?

Mr. King. Yes; I do.

Senator Melcher. A Federal law is necessary, then for that purpose?

Mr. King. It appears to be.

Senator Melcher. I earlier said that the Smithsonian has 18,000 different skeletal remains. What about other museums?

Are we talking about hundreds of thousands? Scores of thousands? What?

Mr. King. We have no comprehensive inventory, as I believe you know, Senator, so we can't say for certain how many there are. I'm aware that small museums, colleges, universities around the country with which I've worked over the years, many times hold hundreds and thousands of human remains; and, of course, many thousands of artifacts. I'd be at a loss to figure out an easy multiplier factor to apply there to come up with a comprehensive, nationwide total. But we are certainly dealing with many tens of thousands of entities representing individual human beings, be they single bones or entire skeletons, in museums and academic institutions across the country. Not to mention those that are in private possession and that are being bought and sold by individuals on the open market throughout the Nation, and internationally.

Senator Melcher. Are they doing that legally?

Mr. King. It seems to be legal. They're certainly doing it.

Senator Melcher. Thank you. Thank you very much.

The Chairman. Senator Evans.

Senator Evans. Thank you, Mr. Chairman.

In your written statement you say that the Council did conclude that "Federal law, including the Archaeological Resources Protection Act, should permit enough flexibility to allow reburial to occur when cultural and religious interests in human remains outweigh their scientific significance."

Let me first ask, in the Georgia case where it did not involve Indian remains, you said the "parties concerned" got together. Who were the parties concerned, when you're dealing with remains of more than 100 years ago? Who were the parties concerned? Who has standing? Who can make that kind of decision?

Mr. King. Well, Senator, the parties concerned in that case were, first, the formal consulting parties under our regulations, which in this case were the Urban Mass Transit Administration, the State Historic Preservation Officer, the Advisory Council, and the Metropolitan Atlanta Rapid Transit Authority. In addition, there was still a local church that was still associated with the cemetery; even though the church had moved, it still was associated with the cemetery that was involved. So the church was a consulting party, as well. It was those parties who negotiated to establish what should be done.

Senator EVANS. No descendants or representatives of families who were interred?

Mr. KING. I would have to check that to be sure, but as I recall, there were no direct identified descendants of the individuals that were interred, no.

Senator EVANS. Let me again pose a hypothetical situation to help try to discern better this relationship between scientific investigation and cultural and religious significance. Let's take a colonial graveyard in Virginia which had the remains of most of the people who lived in or around a particular area, as of a certain time. Let's say that, in reading and developing the history of that time and that area, we learn that there were incidents of certain kinds of disease or something of that nature for which it would be valuable to exhume remains and find out what effect the disease had on skeletal structures and from that, maybe, gain some knowledge that would be useful in today's treatment or understanding of that particular disease. In the first place, is that even a rational postulation?

Mr. KING. Yes; certainly, that's a highly rational possibility and, in fact, occurs.

Senator EVANS. OK. Having started from that position, do you think it's appropriate under today's circumstances, given that set of facts, to exhume the remains for scientific purposes?

Mr. KING. We generally take the position that—I guess that here by "we"—I'm speaking of the archaeological community—we take the position that you excavate remains for one of two reasons, either because they are threatened by some form of external destruction, or because you have an extremely important research question that cannot be answered at a place where things are being threatened by other forms of destruction. In other words, if we can leave them in the ground, we do, both because of the non-archaeological values that they may represent, and because we assume that future researchers will be better equipped than we are to deal with important questions and we ought to leave things around for them to work on.

So in your hypothetical circumstance, I would generally say that it would be the position of the archaeological community that the colonial cemetery should be excavated only if a highway were going through it, or something of that nature, or if it was absolutely critical to get at this question about the health of these particular colonial people. Now, if they had been living on the colonial equivalent of a toxic waste dump of some particular kind and it was absolutely crucial that we find out what the long-term health effects of that particular toxic waste might be—under one of those two circumstances, or some combination of the two, certainly it would be legitimate to exhume them.

Senator EVANS. Well, leave out the first, because we're not talking in this case at least about one where it's physically threatened by a new construction project.

What if the direct descendants of people who were interred objected to the exhuming of their ancestors' remains, and archaeologists and scientists felt that there was a very, very important or strong need to exhume them for scientific purposes? Who should prevail under those circumstances?

Mr. KING. Well, in every circumstance I've ever heard of, the descendants have prevailed in those kinds of circumstances; and I can't really think of a case in which archaeologists have put up a real strong struggle against them.

Senator EVANS. Even though the scientific evidence to be gained might be critical or urgent for today's health?

Mr. KING. Well, the hypothetical example breaks down there. I can't really think of a case in which an archaeological research question has been of such crucial importance that even archaeologists, let alone the local State and Federal Government officials responsible for balancing these things, would conclude—or have concluded—that the research interests outweighed those of the descendants. I suppose I can imagine, as a purely hypothetical matter, that that could happen; but it's very difficult.

Senator EVANS. Well, if that's the case—and I suspect that you're probably accurate—what if, in that graveyard or associated with the same class of people that was urgent to study, were the remains of Thomas Jefferson? Do you exhume him along with everyone else to gain scientific evidence? Or would you suggest, at that point, that probably there would be major outcry?

Mr. KING. Well, I think there would certainly be major outcry, though I recall that back in the 1950's, I believe, the Roman Catholic church itself excavated the remains of Saint Peter, in Rome. Again, when you get to something like Thomas Jefferson having a disease that one absolutely must investigate, you are dealing with such a hypothetical situation that it's very difficult to judge.

Senator EVANS. In general terms you've answered the question as to which prevails in terms of exhuming. Would that same philosophy, then, give a clear answer to this question or this statement that you brought forward, that it should permit enough flexibility to allow reburial to occur when cultural and religious interests in human remains outweigh their scientific significance? Is there a question of scientific significance that outweighs that? I think I heard you say, in the case of the colonial cemetery, that the answer is no.

Mr. KING. Well, I think the same would be true, and I think the same typically is true with respect to relatively recent—that is, in the last 200 years—American Indian remains. Among archaeologists today, as opposed to the people whose letters you heard earlier, if they must excavate the remains of people interred within the last 200 years, who have clearly evident cultural and genetic descendants who want them reinterred, it's a common practice to reinter them. The sticking point for most archaeologists is——

Senator EVANS. It's common practice, except there are a good many remains that probably haven't been returned and wouldn't be returned voluntarily.

Mr. KING. This is true, both because in the past archaeologists were not always as sensitive as they have been made in the last few years, and so there are remains in museums that under modern circumstances would be returned but have not been returned; and because what really gets tricky for most archaeologists is deciding on the point at which somebody has—a group has—a legitimate cultural interest in the remains in question.

Senator EVANS. Thank you.

The CHAIRMAN. Thank you very much, gentlemen.

Our next witnesses, Dr. Leslie Wildesen and Dr. Mark Leone of the Society for American Archaeology.

Welcome, gentlemen.

STATEMENT OF MARK LEONE, CHAIRMAN, GOVERNMENT AFFAIRS COMMITTEE, SOCIETY FOR AMERICAN ARCHAEOLOGY, WASHINGTON, DC

Mr. LEONE. Thank you very much. My name, Mr. Chairman and members of the committee, is Mark Leone. I am the chairman of the Government Affairs Committee of the Society for American Archaeology. Philip Speser is our Washington representative and accompanies me today.

Our testimony was prepared by Dr. Wildesen. Her plane leaves National Airport at 1 o'clock, so she had to leave. And I will run through that testimony for you all.

I would like to say, first of all, that we do appreciate being invited to the committee today, and we want to thank the staff we have worked with over the last number of months.

The Society for American Archaeology is the largest archaeological society in the United States that represents prehistoric and historical archaeologists. We have been concerned with this issue for a long time. We are concerned with it at the level of the field—that is to say, archaeological practice throughout the United States—and we are concerned with it in terms of policy. At the level of our meetings and our publications, this is an issue; that is to say, the relationship of our discipline, which is usually anthropology, to the remains of Native Americans and Native Hawaiians. This is not a new issue to us, and it is an extremely difficult issue because, as so many people already this morning have shown, it has various meanings for various people in various areas.

This morning has been illuminating for us, listening to the tribal leaders and listening to areas—people with areas of other expertise. What I would like to do with regard to this bill is to say that our fundamental agreement is with Senator Melcher's introductory remarks at the end of the last Congress where, in introducing the bill, he suggested that its purpose is education, dialog, and discussion among interested parties. The society fully supports that; that's essential. It's been essential, and it will remain essential. We also believe that, out of a longstanding dialog—and this is the society's chief point—the dialog and the discussions are going to be most fruitfully held at the local level. So in principle, we would prefer that there not be Federal legislation on this matter. We would prefer—not necessarily a board, but enhanced possibilities for discussions between Native Americans, archaeologists, museum professionals, and all other concerned parties so that solutions are possible at the local level among specific peoples which will serve everyone's interests.

We recognize further that when one reads the bill, the issue is equity and self-determination for people whom archaeologists normally treat as subjects or objects. And we fully support the need for greater self-determination. That's a central issue, and we do not deny that; we support that. The question is, then, how?

So of the points within the bill that we do agree with—training, training in archaeology, training in the curation of museum facilities—we would even go further in recommending that museums containing archaeological collections and collections that are ethnographic that pertain to sacred objects be encouraged to expand their acquisition and deaccessioning policies. There are a number of areas that we can agree with. However, we are opposed to a committee whose membership, as the bill specifies, would be unequally weighted between Native Americans and—I don't want to say the scientific community, but the "other" communities that have an interest in these materials, some of them scientists, some of them curators, some of them people in disciplines which are not sciences, like historical disciplines or history.

So we question the ultimate authority, or whether it's wise to have the ultimate authority to make the decision in the board, the Native American board. The provisions about academic freedom are troublesome to us, as well. So we have some qualifications that inhibit our feelings about the bill at this particular point. We do feel very, very strongly the need for continued dialog, continued discussion. We would be happy to continue to work with members of the committee and staff to explore the possibilities for keeping what is basically a grassroots problem at the grassroots, but to have it solved equitably.

Thank you.

[Prepared statement of Ms. Wildesen appears in the appendix.]

The CHAIRMAN. Thank you very much, sir.

One of the early witnesses cited specific cases, and I will try to rephrase these cases.

Two warrior chiefs, supposedly for crimes committed against the United States, were hanged——

Mr. LEONE. Yes.

The CHAIRMAN. Their skeletal remains, via the U.S. Army, found their way to the Smithsonian, so they are now found in boxes or on shelves at the warehouse.

These skeletal remains have been duly identified, and they have been named. Who should have title to this? The tribe, or Smithsonian?

Mr. LEONE. I think there are two answers, Senator. The society doesn't have a position on something like that; that's a Smithsonian issue, but that's passing the buck.

The second issue is, there ought to be a negotiation between the institutions and the people who have a legitimate claim. I'm not entirely sure I agree that it's going to be reasonable to challenge the legal basis for the museums' holdings, but it is entirely reasonable for people, on the basis of kinship—broadly or narrowly defined—to make claims to materials they think are theirs; and then, for the people in the institutions to come to an agreement as to whether or not these things should come back.

Now, as you know, the Smithsonian does indeed have a policy for skeletal remains so that some may be returned——

The CHAIRMAN. There are skeletal remains of over 18,000 Indians there.

Mr. LEONE. Yes.

The CHAIRMAN. Now, these skeletal remains, the two that I speak of have been identified. There's no question about that.

Mr. LEONE. Yes.

The CHAIRMAN. As an archaeologist or anthropologist, what purpose would the Smithsonian have in insisting on maintaining possession of these two skeletal remains?

Mr. LEONE. The justification for large collections, Senator, lies in their coherence.

The CHAIRMAN. In their——

Mr. LEONE. Coherence. In other words, skeletal series, or materials in large numbers that are alike, do provide the basis for scientific experiments—let us say, for chemical composition. Dr. King has already mentioned nutritional studies, and I will mention studies about pollution. As you know, pollution is a very serious problem, but there is no ground for measuring pollution against. Skeletal collections of long series do provide the basis for establishing, at a particular time in the past, what the chemical composition is. The chemicals are, of course, a product of the environment; and as a consequence of measuring them—and it can be measured proportionately—one can have a foundation for measuring changes in chemical distribution in human bodies today. That, of course, this is usually thought to be beneficial.

Now, I recognize that some people would not agree with that, and I'm not going to disparage that position. But the point of having large collections is to do scientific studies on large numbers of things, but those things have to be coherent.

With regard to the two skulls, the two skeletal fragments that you are talking about, so far as I could tell they should be given back with all due dispatch. I can't defend holding those because I don't know anything about them.

The CHAIRMAN. But you are defending the holding of 18,000?

Mr. LEONE. In principle.

The CHAIRMAN. Then if that's the case, why don't we have museums with 18,000 Chinese skeletal remains, 18,000 Japanese skeletal remains, 18,000 Caucasian skeletal remains? Do we have any museum around here that maintains a collection of 18,000 Caucasian skeletal remains of the last 200 years? Do we?

Mr. LEONE. I beg your pardon? Do we have—I've never heard of such a thing.

There is no question that you can construct that question to be a racist statement, and no doubt——

The CHAIRMAN. Isn't this a racist situation?

Mr. LEONE. If we define it as a racist situation, we have to define changing that as more important than whatever the scientific potential and the educational potential of the collection is.

The CHAIRMAN. Is there a scientific or educational potential associated with maintaining 18,000 skeletal remains?

Mr. LEONE. I think it is something that is such a tremendous problem that the only way we can address it is by opening the issue up, having a lot of people evaluate the importance of the collection or their unimportance, and then solving the problem.

Mr. SPESER. If I could just add one note, Senator, there are also, in the Smithsonian and other museums, collections of whites, blacks, Jews—which is my background—and other races.

The CHAIRMAN. 18,000 of them?

Mr. SPESER. In terms of absolute numbers, I couldn't tell you. The issues that you're dealing with, however, from an archaeological perspective are not unique to Native Americans in the sense that the interaction between the scientist and the peoples who you're studying applies regardless of where the kinship comes from or who the ancestors are today. It's a problem that goes across the whole field that is not unique to Native Americans from an archaeological perspective. Now, I'm not justifying 18,000 versus 10,000 versus 5,000 in terms of absolute numbers; that's a question for the experts, as Dr. Leone has indicated. The question of baseline collections applies regardless of the race or the origin of the people.

The CHAIRMAN. I will ask the Smithsonian—but how many Caucasian skeletal remains do we have in the Smithsonian?

Mr. SPESER. I would have to defer to the Smithsonian on the absolute number there. I know that there is a collection of Caucasians; there is a collection of blacks and of other peoples, as well. That's all that I can say for sure.

Mr. LEONE. If I can, Senator, historical archaeology deals in this country with remains from the contact period on, or colonial archaeology. There are relatively large collections of Caucasians, principally English but also Spanish, which have been dug up and studied.

Now, normally, they are put back into the ground, but that's a relatively new practice.

The CHAIRMAN. Normally they are put back into the ground?

Mr. LEONE. Yes; they aren't always, but normally they are.

The CHAIRMAN. I don't suppose they were acquired by systematic digging-up of cemeteries?

Mr. LEONE. Yes; they were. I think it began to be clear in the last statement that archaeology, certainly in the last 20 years, has been concerned with cemeteries and burial grounds beyond those of Native Americans. Lots of them have been dug up.

The CHAIRMAN. Even while the bodies were warm? We're not talking about digging up a burial ground in the Olduvai Valley.

Mr. LEONE. In what?

The CHAIRMAN. In some African valley.

Mr. LEONE. No, no, no. I'm talking about the American Southeast, for example. Obviously, nobody is going to go into a recent cemetery unless the thing is going to be disturbed by a highway.

The CHAIRMAN. I thank you very much. Your testimony has been enlightening.

Mr. LEONE. You're entirely welcome, Senator.

The CHAIRMAN. Senator Melcher.

Senator MELCHER. Doctors, I first want to assert this disclaimer. None of my questions or remarks are to be construed or understood to be anything but in support of archaeology as a profession and a science, because I do support it.

I just wonder, though, on this question of not having the bill pass, no Federal law enacted, and then your recommendations that it be left to a local and State level for resolution, whatever problem might exist. I would adhere to that, except not as far as you would go. The bill sets out the procedures to those matters that can be resolved at local level and State level; we certainly want them resolved there. The board that is set up in the bill would only hear those matters unresolved at the local level. Where a decision had to be made, then the burden of the proof is on the Native American family or band or tribe to establish that proof. And, of course, we envision that the board, as the final arbiter, sets up the procedures of how that proof is demonstrated. So we'd need your help on that, on how the board would establish that.

Well, the point that the society is testifying to on—I think it's the second page of testimony prepared for Ms. Wildesen—is that "solutions have been developed in Idaho, Oregon, Washington, Iowa, Massachusetts, California, Oklahoma, Alaska, Louisiana, New Mexico, South Dakota, Colorado, Utah—everywhere people have treated each other with dignity and honestly sought a resolution to the specific issue."

We very much recognize that, but then we get to the point of where we're at today, and a lot of it seems to be national. For instance, South Dakota, under their State law, has a procedure that in some instances is very satisfactory, and we know nothing wrong with it. But the bones of the Sioux may not be in South Dakota. That's the problem.

Mr. LEONE. Yes.

Senator MELCHER. That's the problem. The bones of the Sioux may be here, or in Cody, WY, or in innumerable places. That's our problem. How else do we resolve that without addressing it as a national concern?

Mr. LEONE. Yes; that's a perfectly legitimate question. It is a problem. One might ask for strengthened policies about acquisition and deaccessioning for these institutions, for example. In other words, demand that the institutions define with great precision what they own and how they would be willing to allow putative owners to have the materials back.

Senator MELCHER. Yes; that's what we thought. That's precisely what we thought we were addressing in the bill, and I believe the language does that.

Mr. LEONE. I hate to be straightforward this way, Senator, but we don't agree with that.

Senator MELCHER. You don't agree with that?

Mr. LEONE. No; we don't. In other words, the way the board is set up there are an unequal number of people distributed on the board; in other words, it's a foregone conclusion, if you look at the numbers of the board, that there are more Native Americans than there is of anybody else. As I remember, there is no museum professional on the board. I may be wrong on that one, but the numbers—it cannot be a discussion and a dialog. It may, in many cases, be a foregone conclusion. What I found so convincing, as well as moving, in this morning's testimony is that it is quite possible for some groups to say that they want everything back, and that's an entirely legitimate claim from within their tradition.

Now, there are museums that have very large numbers of northwest coast items. And we have just heard that some of the primary art objects in American museums are sacred objects, lots of them.

Now, where are those going to go after a committee, whose majority is Native Americans, has made a decision that those things have to leave the museums they sit in now? I want to say that this is not particularly an archaeological problem; those are not archaeological objects, but some of this stuff is archaeological.

Mr. **Speser**. If I could just add one point, Senator, I think one of the things that concerns us—and again, the society has taken part in dialog—I want to emphasize that nobody that I am familiar with in the years that I have been affiliated with the society has ever dug up a warm, fleshed body. Archaeologists don't do that kind of thing. What happened in the past was not done by archaeologists but by soldiers and so on. So it's important to be aware of that.

We agonize over the issue as much as we know you gentlemen are agonizing over it; but nonetheless, when you look at what the bill does, we have heard witnesses this morning testify that there would be disputes, sometimes, even within individual tribes over what is sacred and what is not.

If for some reason the board made a totally unreasonable and erroneous decision, the normal procedures of the Administrative Procedures Act would not apply. There could be no appeal to the courts, for example, and it is aspects like that that make it very difficult for the society to work to craft the bill into a better vehicle, even though there are parts—like on the training side, and so on—that we would support quite vigorously and have in the past.

Senator **Melcher**. Well, let me say this. First of all, that's exactly what we want out of the hearing, is advice and counsel; and I gather that the Society of Archaeology would favor—and I think understandably, and I personally feel that it's a correct point—that if the board is going to have a majority of Native Americans, it might be weighted, just saying yes to every application. So that would seem to say, put some good people from the museums on the board and have a majority other than Native Americans. I think those are good points.

But this question on the next page, "today the definition of what is 'proper' to do to honor a deceased friend or relative is different depending on whether you are Cheyenne or Hopi or Nez Perce, Orthodox Jew or Buddhist or Catholic, Chinese or Nigerian or Spanish." We recognize that. But that isn't what that board would deal with. They would deal with specifics, and only those that couldn't be resolved elsewhere, where a decision had to be made.

Mr. **Leone**. If I may interrupt, Senator, I believe a member of the committee asked or pointed out that what people wanted were materials that were 100 or 150 years old. Now, that changes the nature of this bill, fundamentally; because as the bill is written it applies to all known skeletal materials, or it could, from the western hemisphere, going back 12,000 years. Let's say that's the rough of it. And if it was felt that the vast majority of the remains that were of concern were 100 years old, or there were an age limit on that, that would certainly relieve us a lot. I don't know that it would turn us around with regard to the bill; but as long as the entire population, skeletal population, prehistoric population is not challenged, that's a different matter. And we certainly agree that materials which are illegally or illegitimately acquired are in a different category.

Senator **Melcher**. Let's assume that both of you are sitting on the board——

Mr. **Leone**. Yes.

Senator MELCHER. And the board is trying to ascertain whether a claim was valid. Where would that claim come from? From the tribe or band?

Mr. LEONE. I gather it could come from—yes, even an individual.

Senator MELCHER. Wouldn't you envision they'd have to prove that what they're asking to be returned would be based on fact?

Mr. SPESER. I think part of the problem that we're facing in this, Senator, is that we are dealing with a—even in the few witnesses you've had today—multiplicity of world views. What one group may view as fact or important may be different from another group. It's hard for us, as people who study this, to say that because we think these are facts, everybody else out there obviously must view the world the same way. We have studied this stuff enough to know you can't do that.

Mr. LEONE. I think, if I could continue to answer, Senator Melcher, people's definition of kinship legitimately varies. The one that you commonly find in our own society is a very narrow definition of who is related to whom; it used to be much broader, even in the early 19th century. Among lots of Native American groups, kinship has no limits. It includes lots and lots and lots of people.

Senator MELCHER. I guess you're making the case not to put archaeologists on the board, but I'm asking, do you then—if not scientific people——

Mr. LEONE. Well, I'm certainly going to regret myself.

Senator MELCHER. As a judgment, what do you think that board would function for, if not to ascertain if the claim had some validity and the burden of proof was on the person making the claim?

I wonder if you've had legal counsel look at the bill?

Mr. SPESER. I am a lawyer, sir.

Senator MELCHER. You're not aware of whether you have or not?

Mr. SPESER. I am a lawyer, personally.

Senator MELCHER. You are a lawyer personally, and also an archaeologist?

Mr. SPESER. I am a political scientist by training, and a philosopher. I work with the society.

Senator MELCHER. All right. And you looked at the bill?

Mr. SPESER. I looked at the bill.

Senator MELCHER. You seemed to interpret it different than I. I wonder why that is?

Mr. SPESER. I'm not sure, sir.

Senator MELCHER. Maybe it's because I'm not a lawyer.

Mr. SPESER. That could be.

Senator MELCHER. Or maybe it's because I'm in the business of writing the law rather than interpreting the law. Could that be?

Mr. SPESER. That could be, sir. And if we——

Senator MELCHER. But we would like your guidance, as a lawyer, on how you would like to phrase this so that the board itself could ascertain what the facts are.

Mr. SPESER. That's very generous, Senator.

Senator MELCHER. Would you be comfortable with that as an archaeologist?

Mr. SPESER. Absolutely. Certainly.

Senator MELCHER. Now, this question, then was earlier asked, and I won't repeat it except in this way. There's always some advice here. We don't understand why the board isn't balanced against the Native Americans—on page 5, if you—on page 5, if you read (B), (C), (D), (E), (F), (G), (H) and (I), it seems to be a preponderance of non-Native Americans. I draw that to your attention.

Mr. LEONE. Thank you.

Mr. SPESER. Yes; I believe that—I'd have to have the bill in front of me again, but I believe there are two factors that we were looking at the time, sir. One is the overall composition of the board; the other is who votes.

Senator EVANS. Mr. Chairman, there appears to be an error in the bill since there are 15 voting members rather than 17. But of those 15, 6 are Native Americans; 1 is Native Hawaiian; and 8 are non-Native Americans. So a preponderance of the committee membership are non-Native Americans. I would guess that the concern over the board's tilt probably ought to come from Native Americans rather than the non-Native Americans.

Mr. LEONE. If I have misread it, then I apologize.

Mr. SPESER. Yes; if we've misread it, then that's all there is to that.

Senator EVANS. OK.

Senator MELCHER. The last point just goes along with what the chairman asked about. Do you have knowledge of other museums that might hold similar remains, skeletal remains, of other races? I only want to point at that how we got into this as a Nation seemed to be primarily not from archaeologists but from official action of the U.S. Government through its own directions to the Army. And we really got in the business of collecting large quantities of skeletal remains of Native Americans. But I'm advised that the problem doesn't stop here at our borders; that we find skeletal remains of Native Americans in Europe in museums in some quantity. What we're seeking to do in this bill, of course, is to address our own problems here, in our own country, and we're not seeking by this language to extend that authority beyond our shores.

Thank you both very much.

Mr. LEONE. Thank you.

Mr. SPESER. Thank you.

The CHAIRMAN. Senator Evans?

Senator EVANS. Thank you, Mr. Chairman.

I might just also point out that on the board, as I read it, there are eight non-Native Americans, six Native Americans, and one Native Hawaiian. But there are two individuals appointed by the President who represent the sciences of archaeology and anthropology, and two individuals appointed by the President who are significantly interested and experienced in the matters which the board is likely to consider and provide representation for museums and universities. So there is significant potential representation, it seems to me, for both science and the museum management.

But let me get to the more fundamental question. In one paragraph of your statement you deal with the question of, as you call it, indiscriminate reburial of all human remains, at least in part for the simple historical reason that many human remains, Indian and non-Indian, were never buried in the first place. And certainly, it is true that each cultural and religious group has different views of human remains and what should be done with them. Some religions do not believe in cremation; others do. Some, perhaps, do not bury in the normal sense of the word, that is interment in the ground. Some place their remains above ground and elevated. But whatever they do and however they do it, and whatever changes there may have occurred in the intervening period, we get back to the question I asked earlier on sacred objects. Which view should prevail? Should it be the views of what ought to happen to remains, or whether they were viewed as sacred or whether religion at the time said that the spirit and all that is important leaves the body at the time of death and the human remains are not important? Should it be the views as they existed then, as nearly as we can determine them, or the views of descendants as they are held now that should determine what happens?

Mr. LEONE. Ultimately, I suspect the only position one could defend is that the opinion of the living is what's significant. That's going to vary from time to time with what might have been. It's almost impossible to know with certainty what happened; that is the fundamental paradox inside our problem, inside archaeology.

Our feeling—our position is that there are legitimate points on both sides, or on several sides. While that would probably be the attitude toward members of the board set up, it's the attitude of the society that a plurality of opinions does exist and it's going to continue to exist. There is no way of establishing a series of national guidelines except to say that people must talk. In order for them to talk reasonably, they have to know what they're talking about, both in terms of the artifacts and the skeletal remains. That's why we prefer that it happen at the level of where the problem comes from. That may be at the State, the local, the county level and so on and so forth.

I know that leads, Senator, to the problem of the large national institutions. I can't address that.

Senator EVANS. You mentioned the necessity to respond to the plurality of opinions, and certainly that's the history of most societies over most of our recorded history. I think that we believe in this country that one of the unique parts of our society is the constitutional protection of minority rights, not just majority or plurality opinions. That is what we have to deal with, as well as the current view of people.

You say that it should be the current view rather than the traditional, or the view that existed at the time of any happening. Presumably out of that you would say that if society at some time in the future—all society, you know; our own Caucasian society in this country came to the belief that human remains were of no consequence, that really the spirit had left; that human remains and the burial grounds, which were much more profitably used for other things—then if that's the opinion at the time, then we should just tear up and ignore the graveyards and use them for other purposes?

Mr. LEONE. We have seen societies that do that.

Mr. SPESER. I think, Senator, if I can just point out, the society has been active with respect to the Office of Surface Mining in the drafting of new regulations to protect archaeological and ethnological remains. One of the issues there was trying to provide better protection for cemeteries. It is part of the ethics of the society that we try, whenever possible, to leave archaeological materials alone until they are needed for a precise reason to study them, but not to wantonly disturb them. It is also part of the ethics of our members in general that they think that that is a good policy for other reasons. If the whole country felt differently and passed different laws, it might be tragic from our estimation; but that's a kind of hypothetical downstream and who knows what would happen?

Senator EVANS. We find regularly in this business of making laws, as Senator Melcher pointed out, that we pass laws that are ultimately declared by the courts as to be beyond our jurisdiction. They are unconstitutional in their nature, so the laws aren't the ultimate protection that we try to devise for ourselves.

Turn for a moment to the religious artifacts. Do you believe, also, that in the case of religious artifacts it should be today's view of what is or isn't a religious artifact? If we get to the point where we're talking about returning those to the descendants of tribes or, for that matter, non-Indian groups or units that have continuing religious practices. Which should determine? The time it was made, or the time of our view today?

Mr. LEONE. I don't even believe that it is a question with an answer, Senator Evans. Ultimately, if it were made a matter of determining what the object was long ago, it would probably be weighted in favor of an anthropologist or archaeologist who would probably have greater access to proving the original meaning.

Given the total legitimacy of the issue, it probably should be a discussion between people who are living, over what they think.

Mr. SPESER. What happens now, sir, in the case of excavation, there is very little excavation that goes on without a consultation process, as you heard earlier. So we are predisposed to say, you talk to the people who are living, because we're primarily in that side of things, not in the curation side of things.

Senator EVANS. All right. Or in the business of talking to the dead. If you discover how to do that, pass it along.

But we're talking now, at least in terms of this potential bill and carrying out its provisions, of a number of objects which may or may not be sacred in nature which are now held in museum collections and which are, under the bill, potentially to be returned to the tribes that considered them religious objects. A difficulty that I have is how do you determine? Even if you're able to determine that yes, it was a religious object in 1820 or the time that this object was created; no, the tribe today does not, in its practice of religion, feel that that is a religious object—is it, for purposes of this bill, a religious object or isn't it?

Mr. SPESER. There are no easy answers, unfortunately, because again it comes back to that aspect that we are dealing with the religious cultural world views of people, and those change over time. They've changed—I can look at the history of my own family and see that they've changed. My grandfather was bar mitzvahed; my father went to a synagogue that was reformed, and he had to fight to get him bar mitzvahed. Then I was bar mitzvahed, and there was change. It's sort of presumptuous for us, as archaeologists, to tell other people what their beliefs should be.

Senator EVANS. OK. That's a good answer. Thank you very much.

The **Chairman**. Thank you sir. Thank you very much.

Mr. **Leone**. Thank you very much.

The **Chairman**. Our final witness is Dr. Robert Adams, the secretary of the Smithsonian.

Mr. Secretary, welcome to the committee, sir.

STATEMENT OF ROBERT McC. ADAMS, SECRETARY, SMITHSONIAN INSTITUTION, WASHINGTON, DC

Mr. **Adams**. Thank you, Mr. Chairman. I have a formal statement that I believe has already been submitted, and I hope you will include it in the record.

The **Chairman**. Without objection, your prepared statement will be inserted in the record immediately following your oral presentation.

Mr. **Adams**. I don't think I would like to use the brief time I can take, after a session that has gone on already for some hours, simply to synopsize the position that's taken formally on behalf of the Smithsonian. I would prefer, instead, to touch on some of the many important issues that have come up here during the morning, and perhaps to dispel some confusion. But I would like to begin by saying that I particularly welcome the statement by Senator Melcher that he regards the bill as one that is subject to a good deal of further negotiation as to its contents, and I would hope that not only I, on behalf of the Smithsonian, but that others would be in contact with him and talking further about what the proper shaping of this bill might be.

I think we heard from a number of the Indian representatives this morning, really very eloquent testimony on the importance that their communities attach to the sense of continuity with the past that is represented by skeletal materials, by sacred objects, and that in some sense, at a time when many Indian communities are floundering for a new direction, this is of perhaps exceptional importance. I would also say that the point was made this morning that some of the elders in these tribes are approaching the point when they will no longer be with us, and therefore there is pressure of time. It occurs to me now—it didn't occur to me earlier—that the issue of pressure of time to move this process along was in the minds of those who were responsible for drafting this bill, and I think that's an important consideration and one that we need to keep very much in mind.

Let me begin by saying a few words about the Smithsonian collections. I cannot give you absolute numbers, because our records do not permit that, but I will give you proper orders of magnitudes. Reference has been made to some 18,000 North American Indian skeletons in the Smithsonian collections. Working with that number, our best estimate would be that some 3,500 represent periods since the time of the coming of Columbus. Of that number, some 700 or 800 probably represent the period of the last 150 years. Of that 700 or 800, 45 roughly—by our best count at the moment—are individuals whom we think can be named. Those are all individuals whose skeletons or whose partial skeletons were turned over to the Smithsonian by the Army Medical Museum many years ago.

My assumption is, and it is the policy of the Smithsonian, that when we can find the descendants of those individuals we have the responsibility to return those individuals to their descendants. I might say that as recently as 1984, the skull of Captain Jack, a very famous—and heroic, in fact—northwest Indian was returned to his group, that had been placed in the Smithsonian collections after his execution in the 19th century.

With regard to the two individuals mentioned earlier in this hearing who were hanged, I believe they were Sioux. I should say that the only reason that we haven't been able to proceed further on that is that there are a number of Sioux bands, and we have not yet been able to work out which the appropriate bands are to which those two individuals should be returned. The bands occupy different reservations. There are, in short, research questions that we're actively pursuing. I can assure you that the Smithsonian is not hanging on to those skeletons as a matter of building up the size of its study collections or retaining everything that is in its custody, or anything of the kind. We accept fully the sense of the importance, where there is a known ancestor who can be identified of putting that individual back into the hands of his or her descendants, so that I don't think we really face quite the problem that was outlined at an earlier time in this hearing.

The other point that I would like to touch on has to do with an implication of racism that was mentioned at one point in the discussion. It seems to me we must begin by recognizing that for the study of North American Indians in the period up until the arrival of the whites, the only information available comes out of archaeology. If you conduct archaeology you find individual skeletons in the course of your excavations, and thus in the study of prehistoric North America you do accumulate a large quantity of skeletal materials. We have in the Smithsonian collections something on the order of 15,000 skeletons that represent blacks and orientals and Europeans and people from other parts of the world, so it really isn't a question of the emphasis having been different by virtue of a different racial attitude with regard to Indians. Since most of the Smithsonian's archaeological work has been in North America rather than in other parts of the world. Mainly older, prehistoric Indian populations are represented in its collections.

With the coming of Europeans and the beginning of an historic record, the primary emphasis in research has been on historic documents up until quite recently, rather than on excavations. Now, as you heard earlier, there is indeed excavation going on that's directed toward colonial periods; and now, indeed, we are getting some skeletal materials from these periods in our collections.

It seems to me that the issues that have come forward here are really extraordinarily difficult to deal with. And if I say that I'm hesitant about seeing how to draft a bill at this point, it's because of the difficulty of the issues rather than because of a sense that no bill is needed. There was testimony from some of the Native American religious and political leaders who spoke here today to the effect that everything coming out of the past, so to speak, had to be regarded as having sacred aspects. And there was also testimony that they were really unable to draw a line distinguishing between material of, let's say, the last 100 years and material going back into the very remote past. There were other suggestions that this was not universally felt; in fact, it was conceded even by those that took this position that they were not sure how representative their position was.

Therefore there are really very difficult questions to be coped with as to how one draws a line in looking at this material. I think the questions that will have to be asked are factual questions that will be very difficult to resolve. One of the difficulties is, of course, that with the incoming of the whites there was a vast dislocation of Indian communities as they were pushed forward, for the most part, ahead of the advancing frontier of white settlement. That process is not one which took place in the full light of history, with the positions of individual bands and tribes being recorded at all times. Therefore knowing whether you are in fact dealing with the ancestors of a given community, or with the ancestors of another community that may be in quite a different part of the country today, is very difficult. The existing means of archaeology—for dating, for example—are not such that one can, with any precision at all, attribute these remains to one group rather than another.

Now, of course, there are exceptions in different parts of the country; that's another complexity that enters in. In the American Southwest, where Pueblos have been in place for many hundreds of years, many of them going back to the time of initial Spanish contact, one can have a great deal more certainty than one can in other areas, although again, in the southwest there's the problem of the Navajo, Apache, and other groups who were not settled in permanent communities.

Let me come back to several comments that Senator Evans made about how we define what is sacred and what is not sacred and how we answer the question of whether to deal with sacredness as it was defined at one time or sacredness as it is seen now. Presently, the Smithsonian is arranging to return some sacred vessels to Zuni, a Southwestern Pueblo, after a long process of negotiation. There is still another category of objects about whose disposition we have agreed to suspend negotiations for a time. These were given to the Smithsonian by Zuni religious leaders. Today, they are regarded by the modern Zuni community as sacred objects, and that's been precisely the kind of shift that Senator Evans referred to. We will have to work these questions out in negotiation with the Zuni, and we hope and expect to do so in terms of harmony; but I think that this cannot be expected to take place immediately.

Let me touch for a moment on another object that was mentioned, a pipe that was important to—I believe it was a Dog Soldier band of the Northern Cheyenne. That object is indeed in our collections. We were the ones who furnished the photographs of it to the delegation. Our curator made it plain then, and we make it plain again today, that we are prepared to arrange for the return of that material. It was said at the time that we would meet the expenses of a properly chosen group coming to Washington to work through our Northern Cheyenne collection. That promise was made well over 1 year ago; and we are waiting for it to be followed up.

The problem is a complicated one, and it's one that has to be resolved in terms of the decisionmaking processes of the Northern Cheyenne themselves, who they want to send, when they want to send them, and what position they want to take. But I can assure you that it is not the position of the Smithsonian that we are going to hang on to what we've got and resist performing what is clearly a socially-responsible and constructive act, of helping that society to sustain itself in this difficult time that they now face.

I think I have perhaps talked long enough by way of a general response, but I'd be happy to answer any questions.

[Prepared statement of Mr. Adams appears in the appendix.]

The CHAIRMAN. Thank you very much, sir.

As I have listened to the testimony this morning, I have heard three sets of numbers—18,000, 3,500, and 8,000. Are you suggesting that the figure of 18,000—skeletal remains of 18,000 Native Americans is not a correct number?

Mr. ADAMS. That's the approximate number. We have a total for that collection of 18,000, yes.

The CHAIRMAN. You have the remains of 18,000 human beings?

Mr. ADAMS. Yes; 18,000 plus or minus, whatever the precise number was, yes. Not all of those are complete remains, as has been said, but——

The CHAIRMAN. Well, some are just skulls and maybe a hand?

Mr. ADAMS. That is right.

The CHAIRMAN. Now, this bill, among other things, would provide that a claimant will have the burden of proving by documents or other evidence that the claim is valid and authentic, so therefore I do not suppose claims can be made on the remains of these 18,000 people.

Mr. ADAMS. I think you are probably right. That would be my guess. It's also been said here today, however, that there are Indian groups who sincerely believe that they are part of a unity with their entire past, and that they would certainly seek to press those claims. And that, of course, is indeed their right. So the fact that the claims might not in the end be sustained doesn't mean that they would not be pressed. But the position that I'm taking is not that it is illegitimate for such claims to be pressed.

My primary argument would be that the main emphasis that seems necessary is the one that's contained in the latter part of the bill, on a training function that permits American Indians to come to know what this material is, to come to know how to work in the archives on it, to come to know how to curate it when it goes back to their communities. If this is where the emphasis is, I think we obviate a lot of these other problems and concentrate the effort where it can have the most constructive effect on modern Indian communities and can lead to the quickest resolution of differences.

The CHAIRMAN. So we have a situation where the Smithsonian has in its collection the skeletal remains of 18,000, plus or minus, Indians?

Mr. ADAMS. Right.

The CHAIRMAN. I would gather that most are less than 200 years old?

Mr. ADAMS. Most? No; I said quite the opposite. I said that of the 18,000, there were some 3,500 in the period since 1492. And in the last century and a half, the number would be on the order of 700 or 800, not 7,000 or 8,000; 700 or 800. The numbers are very much smaller for this more recent period. It has not been a target of archaeological activity. Most of those 700 or 800, in fact, would come from transfers from the Army medical collections that were made in the last century, where the motivations were entirely different.

The CHAIRMAN. You have identified 45 of them?

Mr. ADAMS. Yes; 45 named individuals.

The CHAIRMAN. What do you intend to do with them?

Mr. ADAMS. We are trying to identify who their descendants are, and we do intend to return those to their descendants.

Let me make the point that we have the responsibility—these are Federal collections—we have the responsibility to proceed deliberately here, not simply to get them out and get them back to somebody, but to try to identify the proper parties. Who has the proper standing to receive these things? That's a matter that we have to take very seriously, and I don't think we're dragging our feet in doing it. It's often a very difficult question, but I think that now that this matter has come forward in this striking way—and, of course, for many years it didn't—I think we're moving to do so.

The CHAIRMAN. As secretary of Smithsonian, who do you believe has the proper standing to make a claim on, say, the skulls of the two warrior chiefs?

Mr. ADAMS. Well, obviously, if someone makes a claim we will add whatever information they can provide to what we already have. But we're moving as quickly as we can to solve just that question, as to what band these individuals belong to.

The CHAIRMAN. My question is can a tribe be a legitimate party to make a claim?

Mr. ADAMS. I would certainly assume so.

The CHAIRMAN. So it doesn't have to be an individual descendant?

Mr. ADAMS. I would certainly assume that a tribe can make a claim, yes.

The CHAIRMAN. Thank you very much.

Senator MELCHER. Doctor—Bob; I'll call you Bob as you suggested yesterday, when we visited about the bill—first of all, your testimony—and I read it, or at least scanned it—I think I've given it adequate attention. I will review it again after the hearing is over because I think it will be instructive and very helpful.

On the question of provenance, the cost is an item. And while you can't calculate what that cost will be, it appears to me—and I wanted to state this for the hearing record—it appears to me that there is going to have to be some authorization for some assistance on providing the provenance, at least of a number our outstanding museums, and in particular the Smithsonian. But the fact is that without a provenance, the source of the 18,000 skeletal remains is very much unknown. I would believe that if the Smithsonian, in its own excavation, having hired that excavation done, that any skeletal remains that are in the Smithsonian have already been properly identified and some rudimentary, at least, assessment made on their significance.

Mr. ADAMS. I think you'd be wrong in that, Senator Melcher. Take the collection that's already been referred to, that was transferred to the Smithsonian between, I believe, 1898 and 1904, of between 3,000 and 4,000 Indian skeletons from the Army medical collection. They came in boxes, and they were put on whatever shelves there were in those boxes. And the fact that they were taken in was consistent with museum collecting policies at the time which put them on a shelf and assumed that they would be of interest to someone at sometime, and kept the records—quite often kept the records in several different places, but that doesn't mean that they've been studied at this point.

Senator MELCHER. I think you and I are starting at opposite ends, now. By the way, between 3,000 and 4,000—that's what's confusing to us. First of all we got the figure of 18,000, then we got a figure of 3,500, then we got a figure of 700 or 800. Now we've got figures of between 3,000 and 4,000. But I'm starting at the other end. I'm starting where the Smithsonian had the direct responsibility of hiring the excavation done on an archaeological site, and following them into the Smithsonian. I assume that—I'm quite certain that those are properly identified.

Mr. ADAMS. I'm not sure I understand you. Let me try it another way.

Senator MELCHER. You paid the money. As I understand, the Smithsonian paid the money out, no matter when you started; you paid the money out for an archaeological dig. It indeed was kept track of with an almost religious zeal.

Mr. ADAMS. Senator, I think a great deal of the material in our collections is not material for which the Smithsonian paid the money for the excavation. One goes back, for example, to the river basin surveys and excavations in the 1930's and the 1950's, and our connection with much of that work was superficial, but the collections ended up here.

The CHAIRMAN. That wasn't your work—that did not start as a Smithsonian dig.

Mr. ADAMS. I'm sure that our excavations have not produced 18,000 skeletons.

Senator MELCHER. The fact is, very few of those skeletons can be identified for whatever era they came from.

Mr. ADAMS. All right.

Senator MELCHER. You will agree with that?

Mr. ADAMS. Very few is a relative term. Let's accept that a considerable proportion may be of very limited use to science; I would agree that that's probably so.

Senator MELCHER. Let's be more basic. There are very few out of those 18,000 that have been identified in any way, shape, or form as to what era they came from.

Mr. ADAMS. Well, I would be unable to answer that. But I think that's too sweeping a statement, Senator. I cannot give you proportions on the number that——

Senator MELCHER. I'll just state it this way. It's quite likely that very few of them can be identified as to what era.

The point I'm getting at, Bob, is this. Saying only a few in the last 150 years, only a few more going back to the time of Columbus—I think that needs to be decided. I don't think it's known now by the Smithsonian. I think it needs to be decided, and I think that provenance is absolutely essential. I understand the cost item. I think we have to provide, at least through the authorization process, for some assistance on that and to other museums of the nature—perhaps not as high a stature as the Smithsonian, but nevertheless of a very high stature.

Mr. ADAMS. Senator, may I ask you to consider a slight addition to that?

Senator MELCHER. All right.

Mr. ADAMS. It seems to me that rather than having an authorization for additional funds for the limited Smithsonian staff in this area to carry on those identifications, this is an opportunity for a training function in itself.

Senator MELCHER. Absolutely.

Mr. ADAMS. It would be very valuable if you do this and succeed in this to have that be an activity in which we are directly involving American Indian students in training themselves.

The CHAIRMAN. Will the Senator yield?

Senator MELCHER. Yes; I'd be happy to yield to the chairman.

The CHAIRMAN. I will have to leave because I am late for another meeting, but the committee records will be left open until Friday noon next week to receive any additional testimony that any of you would wish to submit, and I will ask the senior Senator from Montana to carry on and adjourn the hearings.

Senator MELCHER [assuming chair]. All right. Thank you very much, Mr. Chairman.

That, Bob, leads to the second point that I have here. We view the time span for all of this to take place as being not a very short time span. I think I mentioned, in regard to testimony we were receiving from one of the tribal witnessess, would a 20-year procedure seem about right? And as I recall, he agreed that that was going to take time. I think even the process of a tribe making a claim, and the procedures that they want to follow in making a claim, is by necessity a process that takes a while for them to address it by their tribal council—first of all, decide if that's how they want to address it, through the tribal council—and then develop their rationale and their facts as they best can piece them together, and what they want to review.

Mr. ADAMS. Senator, I'm sure you're right that this will be a lengthy process. I'm very uneasy about speaking in terms of time limits because—let's take if from the point of view of the Indian communities themselves, for a moment. I indicated earlier that our present order of uncertainty with the dating of specimens—skeletons, for example—is really quite high. Most of those who are familiar with radiocarbon dating would say that the best you can really count on is a plus or minus of about 100 years. That doesn't say that the technology stops here; the technology will undoubtedly improve. It is quite possible, from the point of view of the Indian communities involved—it is certain, I would say—that our knowledge of the movements in the past of Indian communities will get better. Cases where we are quite uncertain today, by the best analysis that we might conduct, about the attribution of such-and-such remains to one group or another may become matters of certainty within 40 years instead of 20, or 10 instead of 5.

I guess all I'm getting at is, given the way in which the discipline itself is evolving, a single determination is likely to create what will be presently perceived as injustices. I think there are some problems there that need to be at least kept in mind, even if I recognize that basically we legislate to get ourselves out of our present problems, and not with an eye on the long-term future.

Senator MELCHER. Well, I didn't mean to infer by mentioning a time span that it was a procedure that had to reach an ending within that time frame. I'm just trying to get some perspective on how long a task we have by setting this type of procedure. I think it's long time.

Now, yesterday in our discussions, the point was raised as to—aren't we dealing with something that's of the nature of a judicial procedure? And from that discussion, I mentioned that possibly something like the Indian Claims Commission would be a better body than the board that we have described and called for in the bill as it is now drafted.

Do you believe that a commission with some judicial powers would be a better method, better procedure?

Mr. ADAMS. Well, this is a legal question that I'm not sure that I have any qualifications at all to comment on. I think you will find that judicial procedures are presently involved in this process, whether you use a commission format or have cases that then get litigated in the courts that come out of the arrangement that you presently have in mind. It seems to me that some judicial powers probably would simplify things; but I repeat that I'm not a lawyer, and I'm not sure what the balance of advantage is in going one way or the other.

The cases that would occur to me, Senator Melcher, that are going to be very troubling are ones somewhat like the Zuni case that I mentioned earlier, where there was a transfer made under what were at the time considered to be legitimate circumstances but that now may look somewhat different. There was an active purchase of a buffalo robe made in eastern Montana in the 1830's, let's say, by some of the Rocky Mountain Fur Company people on their way up the river, a genuine good-faith transaction—or was it one in which they used liquor or force of arms or various other forms of pressure in order to arrange for it? How do we disentangle the circumstances of transfers made at an earlier point in time and decide whether that was a legitimate or an illegitimate transfer of title? Those issues are ones which I am afraid are going to end up in litigation no matter what we do. But it seems to me the more deliberate and thoughtful the process is on the way in, the better might be the outcome. That would seem to me to point toward attaching at least some judicial powers to such a commission.

Senator MELCHER. I think that one of the witnesses testifying for the Society of Archaeology stated—or perhaps misstated—the case by saying that if this bill became law, that an Indian tribe going through this procedure, after administrative review, would have exhausted their rights. I don't believe that's true at all. I don't think this bill extinguishes rights. But I don't believe this bill attempts to resolve everything. I think this bill only attempts to set in motion and in existence a procedure for determining claims. Whether or not it would be wise to extinguish rights, I don't know, but that's a pretty heavy question here in Congress.

Mr. ADAMS. No; I understand that.

Senator MELCHER. I don't believe we'd want to.

Mr. Adams. Senator, let me ask—a number of us this morning have referred to the Indian claims procedures, and in some sense that example is perhaps part of the argument for moving toward a more judicial commission. But as I understand it in that case, behind the settlement that was reached in the end, lo and behold there was the Federal Treasury. Now, however, we're talking about objects that may be in private collections, in private museum collections, in many different places. And it seems to me that we find ourselves imbedded in the common law there somewhere, and not quite in the same situation. Have you given some thought to how this might be resolved?

Senator Melcher. Well, I believe we are imbedded in common law, and the parallel is not the same at all. The procedures that were followed through the Indian Lands Claims Commission was a procedure that seemed to be practical and seemed to be workable and, in fact, did work. But this is not a direct parallel. This is entirely different. I think it is embedded in common law. And in my judgment. You know, it's easier for nonlawyers to make legal statements than it is sometimes for a lawyer. But in my judgment, based on common law, the rights are very strong for Native Americans. My purpose in the bill is not to put them in court but to establish a procedure that works without going to court.

I think almost all of us come from the same point of view on that. The question is whether the bill would work or not. I believe that it probably would work, but we want advice on how best to make it work.

The question of racism, which has been discussed slightly probably does not exist now in the view of the Native Americans. However, I believe it was Earl Old Person who said that for a period of time, we felt that what has happened. Speaking of his own tribe in particular and Native Americans in general, that what has happened to us has been a series of events that have been harmful. The significance of the sacred artifacts was the ability to carry on the ceremonies that are traditional and are religious. That point of view was also expressed rather directly and eloquently by William Tall Bull of the Northern Cheyenne.

While there may be proximity now of the Northern Cheyenne and the Blackfeet, it's still 300 or 400 miles. The development of this type of religious ceremony, was not developed with each tribe sharing their practices; to the contrary, it was developed separately.

I don't believe we have any understanding at all of the significant development of religious belief by people of different tribes who never really intermingled with each other, never shared the same camping ground, never shared anything, didn't intermarry; didn't understand each other's language. If they understood each other at all, if they communicated with each other at all, it was through sign language. Sign language cannot be construed as being some sort of dialog that means that you share these religious beliefs. Yet when one of us takes the time to discuss religious matters with them, we find a great deal of similarity among the tribes.

I think our purpose is common in this, we just don't give them enough. This is common, I think, in general between the Indians and non-Indians and between scholars and just ordinary people like myself. I think we wish to know a great deal more about this religious background of Native Americans, and I feel a great urgency, if we're going to gain knowledge on that, of the continuation of their own beliefs within the tribes themselves. Without the sacred religious artifacts, there is a tendency for it to die out.

Mr. ADAMS. Senator, your remarks lead me to say that what I find really depressing—not about this hearing, but about the fact that there has been a need for this hearing—is that fundamentally, archaeologists and all Native Americans are on the same side, or should be. That is to say, the purpose of the archaeology has to be to provide that sense of continuity with the past which is also involved in any great religion. It's partly what makes a religion continue as a living force. And here we find ourselves, as a result of the way in which research gets carried on and the way in which museum collections have been built and the processes by which the frontier advanced and all the rest of it, we find ourselves in a situation where one would gather, from this hearing, that the Indian communities are pulling in one direction and the archaeologists in another. What seems to me to be fundamentally wrong with that would be best corrected by increasing the effort to provide people with historical training, with museum training, people who can provide a bridge between those two communities pulling in two different directions now, and that means people from Native American communities. The more effectively and the more rapidly we do that, the more quickly we get past the point of trying to worry about whether that object is really sacred or really just another lousy artifact and get to deal with questions of the place of the sacred in human life, which is an important question for all of us, and with the continuity of Native American communities right up through the time of the conquest and until the present.

I would like to think that, even though the problem of sorting all this out may go on for some decades, what's transitory is this appearance of opposition it comes out of the fact that almost all of the archaeologists now working are whites with university training and the Native American communities are, in a sense, excluded from that process of investigation. That's what seems to me to be fundamentally wrong with this system, and it's where I do hope a good part of your efforts in improving the bill are turned.

Senator MELCHER. I think you have stated it quite precisely. I would only add one thing in regard to the religious artifacts point. This is a living religion.

Mr. ADAMS. Yes; I agree.

Senator MELCHER. That the tribes are interested that it continues. It's their belief that the absence of some of these sacred artifacts is, in essence, a reason that they're not so successful now, because their prayers are not complete without the artifacts. I think I can understand that.

Mr. ADAMS. I can, too.

Senator MELCHER. What is more puzzling to me, but which I want to understand more fully, is how these religious beliefs and these religious practices complement whatever other religious beliefs and religious practices that the Native Americans have. They vary, of course, by individual. That is not necessarily at all common among the tribes. But what is common among the tribes is an acceptance and a respect and a belief that the religious ceremonies are indeed important prayers, and that they do have a direct bearing on whether or not good comes to the tribe or bad comes to the tribe, putting it in its simplest terms. That is worth knowing for all of us. I think in a country that is founded pretty much, as far as we non-Native Americans are concerned, on the basis of either political or religious persecution, we want to be as a government that respects this religious belief of Native Americans and gives it the fullest opportunity to be practiced.

That's all I have to say, Doctor. I want to thank you very much. I think that the process that we envision in this bill is one that, if we craft it correctly, will be workable and constructive.

Mr. ADAMS. Well, I look forward to having further conversations with you about that, sir.

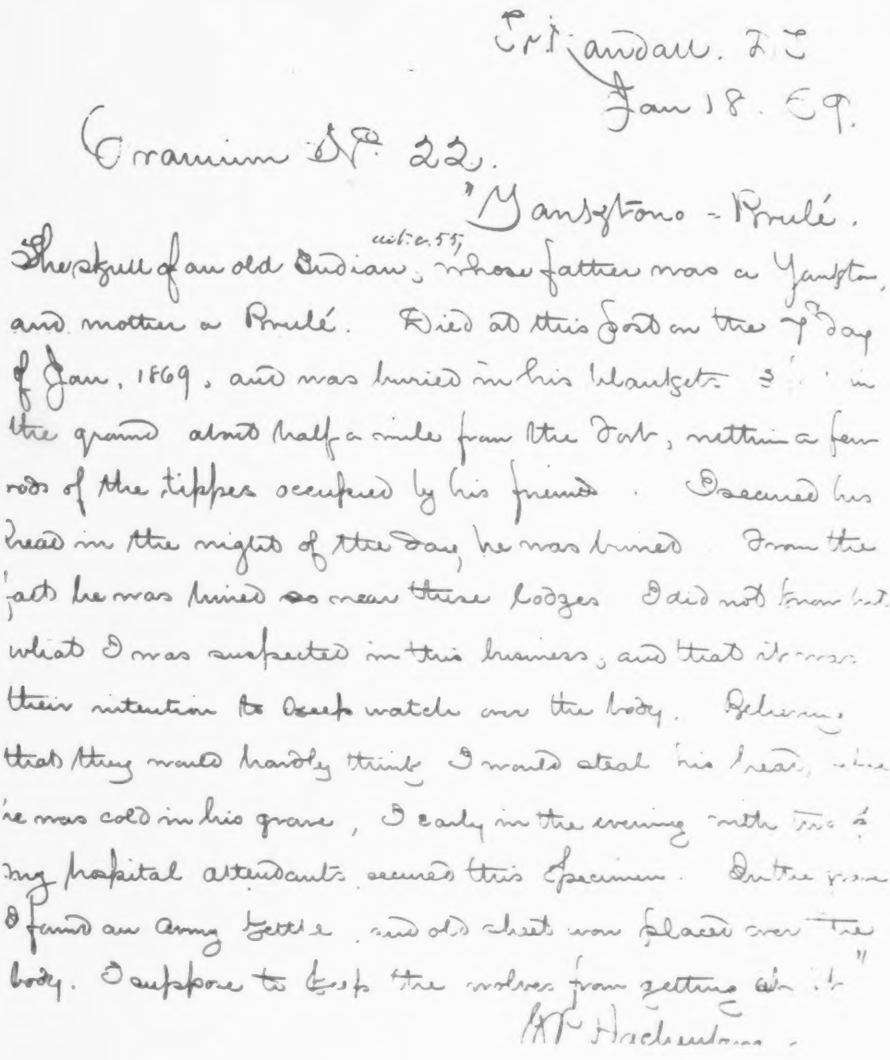
Senator MELCHER. Thank you very much.

The committee is adjourned.

[Whereupon, at 1:44 p.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD



Ft. Randall. D.T.
Jan 18. 69.

Cranium No. 22.

"Yanktons - Brulé.

The skull of an old Indian, aet. c. 55, whose father was a Yankton, and mother a Brulé. Died at this Post on the 7th day of Jan, 1869, and was buried in his blankets & in the ground about half a mile from the Post, within a few rods of the tepees occupied by his friends. I secured his head in the night of the day he was buried. From the fact he was buried so near these lodges I did not know but what I was suspected in this business, and that it was their intention to keep watch over the body. Believing that they would hardly think I would steal his head, when he was cold in his grave, I early in the evening with two of my hospital attendants secured this specimen. In the grave I found an Army kettle, and old sheet was placed over the body. I suppose to keep the wolves from getting at it."

Fort Laramie [illegible]
August [illegible]
[illegible] Richardson
[illegible] 14th Infantry [illegible]
Post [illegible]

Forwards specimens for Army
Medical Museum.

Received & forwarded
[illegible]

[illegible]
[illegible]

A. M. M. Nos 792. 793.
Anatomical Section

Rec'd Sur Gen Off
Aug 22
18[illegible]

Museum

Spec 782 & 783
Anatomical Section

[illegible]
[illegible]

Sir

I have the honor to forward through you to the Surgeon General U.S.A. in compliance with [illegible]

[illegible]

[illegible]

I am [illegible]
Your obedient [illegible]

[illegible]

[illegible]

A. M. M. 792.

Section IV A. 725.

Cranium of a Sioux Chief, aet. c. 55, named "Blackfoot."
hung in 1866 by order of "Col. Thomas Moonlight"
11th Kansas Vol. Cav.

Exhumed and forwarded by —
Priv. S. H. Richardson Co. K. 4. U. S. Infty.
Sept 15th 1870.

A. M. M. 793.

Section IV A. 726.

Cranium of a Sioux chief aet. c. 60, named "Twoface" hung
in 1866. by order of Col. Thos. Moonlight 11th Kan.
Vol. Cavalry.

Presented by Private S. H. Richardson
Co. K. 4th Infy.

Sept. 15th 1870

A. M. M. 792.

Section IV A 725

S. G. O.

Sept. 15th 1870

George A Otis
Asst. Surgeon U.S.A.
Curator. A. M. M.

Memorandum in relation to Cranium of a Sioux Chief hung in 1866 by order of Colonel of 11th Kan. Vol Cav.

A. M. M. 793.

Section IV A 726

S. G. O.

Sept. 15th 1870

Geo. A Otis
Asst. Surg U.S.A.
Curator A Med. Museum

Memorandum in regard to a Sioux chief named "Twoface" hung in 1866 by order of Colonel 11th Kan. Vol. Cavalry.

SURGEON GEN'LS OFF. SEP 20 1870

[redacted]

⑨

2/20

Dear Senator Melcher:

The Native American Advocacy Project of the Friends Committee on National Legislation (FCNL) will formally be submitting a letter of thanks, to be included in the record of today's hearing, for your leadership in introducing S. 187, the "Native American Cultural Preservation Act." As an organization representing like-minded members of the Religious Society of Friends (Quakers), we are grateful for the attention you are bringing to this important issue of religious freedom and tribal self-determination.

Sincerely,

[redacted]

Native American Advocacy Project
Friends Committee on National Legislation

FCNL
FRIENDS COMMITTEE ON NATIONAL LEGISLATION
245 Second St. NE, Washington, DC 20002
(202)547-6000 Office
(202)547-4343 Update Tape

STATEMENT ON S. 187,

"NATIVE AMERICAN CULTURAL PRESERVATION ACT"

Submitted to the SENATE INDIAN AFFAIRS COMMITTEE
by Cindy Darcy

February 20, 1987

The Friends Committee on National Legislation takes this opportunity to thank Senator Melcher for his leadership in introducing S. 187, the "Native American Cultural Preservation Act." In addition, our thanks goes to the Senate Indian Affairs Committee for holding a hearing on this legislation early in the 100th Congress. We heartily agree with the bill's findings that there is a moral obligation for skeletal remains and sacred objects to be returned to Native Americans from museums and other institutions.

We applaud Senator Melcher's leadership, encouraged in part by responsiveness to tribes in his own state of Montana, in bringing the sensitive issue of "reburial" or repatriation of Indian remains and sacred objects to the attention of the Senate Indian Affairs Committee and the Congress. As the Committee is aware, the issues which the "Native American Cultural Preservation Act" would address are often not talked about easily by Indian tribal and traditional leaders -- not only because of their sacred nature, but also because of historic oppression of Native religious traditions and lifeways. We thank Senator Melcher and the Committee for your openness to gather input from tribal and religious leaders on S. 187, and are sure that careful and thoughtful consideration of the provisions of the bill may only make it more effective in achieving its purpose of greater respect for American Indian, Alaska Native and Native Hawaiian peoples -- both those alive today and those whose spirits continue with us.

The Friends Committee on National Legislation (FCNL) is a Quaker organization which since 1943 has brought before the United States Congress the peace and justice concerns of like-minded members of the Religious Society of Friends, or Quakers. Our Native American Advocacy Project seeks

Mark Hulbert Clerk, General Committee
Carolyn C. Rudd Clerk, Executive Committee
E. Raymond Wilson *Executive Secretary Emeritus*
Edward F. Snyder Executive Secretary
Ruth Flower Legislative Secretary
Nancy C. Alexander *Legislative Secretary*
Alison D. Oldham Legislative Action Coordinator
Selig Goodman *Development Secretary*
David M. Boschen Associate Secretary for Administration
Cindy Darcy *Native American Advocacy Project*

to articulate Friends' long-standing tradition of friendship with and concern for Native Americans. In speaking to legislation, we encourage support for treaty rights, the right of Indian and Native communities to determine and govern their own affairs, and a right relationship between Indian tribes and nations and the federal government.

Friends believe that all people are children of one Creator God, a God whose Light illumines all people. Believing that there is that of God in everyone, Friends, since coming to the New World in 1655, have held up the equality of all peoples and sought to be advocates on behalf of the oppressed. Friends' own history sensitizes us to issues of religious freedom. In the mid-seventeenth century, Quaker founder George Fox petitioned the king of England regarding the right of Friends to practice their religious beliefs.

* * * *

The dominant Judeo-Christian society would recoil if it were to discover the historic Gutenberg Bible gathering dust inside a plastic bag, on a remote shelf in some seldom-used room. Finding Westminster Cathedral and the Vatican crammed into an immense filing cabinet would provoke reaction, even though those houses of worship are not regarded as themselves sacred. But perhaps the degree of offense would be greatest to think of the Dead Sea Scrolls, the stone tablets given to Moses with the Law inscribed, and the Shroud of Turin -- objects imbued with spiritual power -- behind glass in a museum display case, labelled as ancient writing materials and clothing.

But Indian tribal and religious leaders have been similarly offended and disturbed to find sacred and ceremonial objects of their tribal traditions, once crucial to tribal ceremony, piled onto racks and into cabinets for storage in museums, private art collections, and universities around the world. Some of these items were to be seen and used only by members of a particular secret religious society. Many items used in religious ceremonies are not merely symbols, but are or represent spirit beings, and are full of power. Not only have these objects been profaned by this insenstive public display, but the tribe that once used that object has been prevented from having the power associated with or residing in it. Keeping objects vital to the life of a Native community from that community in effect takes away from and debases that culture.

Native peoples are even more deeply offended that remains of their ancestors -- laid to rest for their journey to the spirit world -- have been disinterred and placed in storage in laboratories or on display in museums. Recently, as tribes and national Indian organizations have inquired into the holdings of museums, it was discovered that the Smithsonian Institution had a collection of some 32,000 human skeletal remains from Canada, Mexico and Central and South America, as well as 14,000 American Indian and an unknown number of Alaska Native remains.

While western culture, with Hellenistic roots, has traditionally divided life into material/spiritual, secular/sacred, Native worldviews hold that the spirit world is omnipresent and all-pervasive. Our word "religion" derives from the Latin root meaning "to bind together." Religion in tribal life did indeed bind together every aspect of life, and everything was regarded as sacred and full of meaning.

Indian peoples hold that they are all responsible for the care of the spirits of their collective ancestors. Therefore, it is not relevant whether or not they may be "direct biological descendants" of the person whose remains have been stored at some institution. After death, a person's remains must be undisturbed in order to insure that person a safe journey to the spirit world and eternal peace in the afterlife. If the dead's remains and the grave goods placed alongside the dead are disturbed, a spiritual imbalance results and that person's spirit is prevented from helping the living.

Museums and centers for scientific study advance the arguments that study of remains and sacred items is necessary to provide a scientific record of prehistoric life in North America, and that it is incumbent upon these institutions to preserve and maintain these collections for the benefit of people all over the United States and the world. However, possession of ancestral remains and ceremonial objects is viewed by tribal and Indian religious leaders as exploitation and racism. Only an assumption that Native peoples are "living fossils," inferior to western civilization, permits their religious and cultural beliefs to be so blatantly disregarded.

Native gravesites, often unmarked and/or belonging to tribes which were removed from the region under federal policy, have often accidentally been disturbed in the course of energy development, fencing for grazing purposes, erosion, and excavation for roads, subdivisions and dams. But what happens to Indian remains is all too often different from what would happen in the case of non-Indian remains. A road might be re-routed in order to avoid bulldozing a local church cemetery, or remains that were disinterred would be reburied immediately -- NOT labelled "historically significant" and shipped off to a museum laboratory. A case in point is the June, 1986, reburial with ceremony at the Custer Battlefield National Monument in Montana, of the remains of 37 troopers of the U.S. 7th Cavalry who died with General George Custer during the Battle of the Little Big Horn. Were those soldiers reburied as heroes rather than sent to a laboratory for study of 19th century diet and lifestyle because they were white?

Museums have sought to make their case for keeping sacred items by stating that they are "preserving" or taking care of those items. However, the tribal purpose of ceremonial objects has been that they indeed be used -- to keep them in storage or on display is NOT taking care of them. Furthermore, these objects cannot be cared for without a proper understanding of religious knowledge and the purpose behind them. It is not just the object, but its context, that tribes seek to preserve. Tribes, upon the return of sacred objects, want those objects to resume their place in tribal life -- to be used so that the spiritual power those objects bring into the tribe may once again benefit the life of the community.

In the last century, Indian "artifacts" and skeletal remains were gathered largely in anticipation of the death of American Indian cultures. However, today, as they have for tens of thousands of years, Native people continue to survive. In this light, it is necessary to re-evaluate this 19th-century concept of "racial hierarchy," in which western civilization was regarded as the epitome of human progress and in which all other (non-white) cultures were viewed as unsophisticated forerunners of the "real man." Hence, the original purpose of such scientific study and collecting must also be questioned, and, in fact, replaced by giving Indian tribes control over their own histories.

In closing, the Friends Committee on National Legislation acknowledges that S. 187 addresses a particularly sensitive subject, made all the more difficult because of implications of cultural inferiority that, sadly, have prevented Native Americans from enjoying religious and cultural freedom. We encourage the Senate Indian Affairs Committee to continue to press forward with this issue, while allowing sufficient time to solicit input from tribal and traditional leaders, who may wish to comment on how such a legislative proposal may better facilitate the return of Indian remains and sacred objects. We hope that the "Native American Cultural Preservation Act" may sensitize the archeological and scientific communities to the worldviews and beliefs of Native Americans, and foster greater dialogue, consultation and respect for Indian peoples, their lifeways and traditions.

The Friends Committee on National Legislation believes that the issue of reburial and repatriation is one of religious freedom, as well as fundamental respect for the integrity of Indian and Native peoples and their cultures. The purposes of S. 187 are in accord with the First Amendment of the U.S. Constitution and the "American Indian Religious Freedom Act" of 1978, which states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to ... use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." It is only through the repossession of sacred items, and their continued use within tribal society, and full respect for the gravesites and remains of ancestors who continue to be connected to Indian communities today, that this basic right of freedom of religion for Native Americans will be fully realized.

Prepared Statement Of Bill Tall Bull
Northern Cheyenne Tribe, Inc
Montana

Mr. Chairman, I am privileged to bring you and the other members of the Select Committee greetings from the Northern Cheyenne Nation.

We deeply appreciate the honor of speaking first in this august assembly although we are most aware that in all native matters the last words spoken are usually the wisest.

Historically and consistently, the Cheyenne Nation, as represented by our Sacred Covenants, has set forth in defense of its rights and privileges, and, in so doing, has also protected the rights and privileges of all Native Americans as well.

That same consistency and prayer has been applied on all major battlefields and conflicts of the United States from the beaches of Okinawa to the beaches of Normandy, from the Yalu River to the River Rhine and from the mountains of Solerno to the swamps of South Vietnam.

Always have we given our utmost. Always have we returned home in honor to care for our wounded and bury our dead and should those terrible times occur again by some misfortune of the future, we will rise as often as is needed to the call.

Now, herein we ask of you in this matter before us that you, in turn, honor, defend, and protect our antiquity and heritage as we have so deigned to do for you at your bidding throughout the world.

The strength of any nation is largely dependent on its heritage and to the extent that that heritage arouses and brings forth elements of courage and sacrifice in times of peril does that nation display its greatness. The driving force is patriotism. "Liberty and justice for all" is the end result.

Even more so for Native Americans as our heritage is also perceived as the very essence of our spirituality. The driving force of that Spirituality is God whom we call Maheo, and the fuel that leads us to that driving force is the Convenants, ceremonies, and rituals given to us, as well, by Maheo as we seek for courage, wisdom, and peace.

It is very questionable whether we can reach these most sought-after goals, and whether or not for most Native Americans this can ever be achieved until to the largest extent possible our ancestors are returned to us for reburial and our Covenants and ceremonial items are restored to the proper places.

In the only terms that the vast majority of this country may be able to understand, from the standpoint of antiquity, we refer you to the Holy Bible, First Book of Samuel, Chapter 4, verses 1-22: (Quoting the wife of Phin'ehas in verse 22) "And she said, 'the glory has departed from Israel, for the Ark of God has been captured.'" This loss of the Covenant of the Ark resulted in the slaughter of 30,000 Israelite soldiers, so greatly were they demoralized.

When medicine bundles and graves are desecrated and objects used in rituals and ceremonies are missing to that extent is the tribe severely weakened and demoralized.

Rituals in which these sacred articles are used are exacting. No substitutes can be used and much of the meaning and spiritual value is lost as a consequence when any of these articles of antiquity are lost.

The talk nowadays is to restore tradition to Native Americans and to revitalize our cultural heritage and pride.

That historical heritage and pride in most instances begins with what is now being held in ransom for dollars. That is where this quest must begin rather than with the advent of bi-lingual education, for example, as badly needed as bi-lingual education is.

Without these items in our proper possession, the next chapter cannot be truly lived and written for we believe thoroughly that the social problems which beset our tribe now are a direct result of the desecration of our graves and the unwarranted plunder of our sacred objects as a part of the federal policy of Manifest Destiny and resultant genocidal actions.

In extolling the virtues of some religious practices, we hear one persistent theme "the family that prays together stays together". How can the extended families of the Cheyenne stay together for lasting mutual benefit and progress until those objects which we use to pray with are returned to us so that our rudely interrupted evolvement can once more be resumed?

As many times as it has been asked before, so too must it also be asked here so that some day you may finally and fully understand. What would be your response and feeling if your grandmother's grave were opened and the contents shipped back East to be boxed and warehoused with 31,000 other separate boxes of similar remains and even before this was done, that on the day after her death, itinerant pot-hunters were allowed to ransack her house in search of "artifacts" with the blessing of the United States government? Would you welcome these acts or would you strive to change those practices and rectify the damages?

You know, of course, that this will never occur to members of your family. It is uncivilized. it is savage. It is barbaric. It is inhuman. It is sick behavior. It is unChristian. It is punishable by law.

Yet, year after year, since the advent of Europeans upon this continent, has that same behavior been provided Native Americans in the name of archeology, museumology, hobbyists, amateur collectors, pot-hunters, anthropologists, social scientists, etc. etc. Moreover, has such behavior been protected, fostered, and condoned in major mockery and double standard time and time again by conquering caucasoid nations as they seek to preempt the freedoms of indigenous people all over the world.

That progression is:

1) send in the emissary with the trunk full of beads and mirrors;

2) send in the missionary with the missals and medicine;

3) send in the educators with the message of false hope;

4) send in the treaty makers;

5) send in the "refuse of other teeming shores": to break those treaties;

6) send in the army to protect the "refuse";

7) send in the anthropologist to apologize and the archeologist to eulogize;

8) and, if that is not enough, send in the clowns, send in the clowns or better yet the bureaucrats.

COMMUNAL ARTIFACTS

There are many communal artifacts of a sacred nature located in museums throughout the United States and other countries. Some of these objects are parts of medicine bundles that are still in use today. The Cheyenne Tribe has some items missing from their bundles.

Item I

One article is missing from the Covenant that holds the Sacred Arrows. This article is located at the Cody, Wyoming, museum. The article is described as a hide strap that is marked. The marks on the strap indicate the number of times sweet grass is offered a burnt offering as part of the ritual. The Arrowmen and elders of the Northern Cheyenne Tribe have urged the return of this artifact.

Item II

The Dog Soldiers Society of the Northern Cheyenne are requesting the return of what is left of a chief bundle taken by Major North's soldiers at the Battle of Summit Springs, Colorado, in 1869. Tallbull, chief of the Dog Soldiers, was carrying the chief's bundle when he was killed.

The Dog Soldiers use this bundle when there is a reseating ceremony. New membership is established in this manner. This includes a pipe, Dog Soldier rattle, pipe tamper, and braided sweet grass.

Search for Graves of Cheyenne

I have traveled to Fort Robinson, Nebraska, as part of historical research for the Dull Knife Memorial College. The descendants of Dull Knife have always wondered where their people were buried. I was told by government historians that there was a mass grave located near Fort Robinson across White River near a saw mill. I have not found this mass grave. I learned later that the army officials issued orders to dig up the Indian remains, put them on a train and ship them to medical colleges in the East and into Canada. I wonder if they are part of the 31,000 skeleton remains located in the Smithsonian Institute. A search of the Fort Laramie records of this era we are told may reveal further disgraceful conduct.

The Northern Cheyenne Tribe urges the return of the remains of our people and the ways and means of funding so that we may provide a proper final resting place for our dishonored deceased.

Items of General Concern

Senate Bill 2952 upon referral to the Select Committee after two readings in the Senate attempts to set forth ways by which these issues may be resolved.

These ways in the main are acceptable except wherein time frames are not clearly indicated; sequences are not clearly scheduled; provenance is not in place first in order to make accurate judgments as to the extent and location of various collections and determinations as to type of collection and value of said collection. All of this and more must be present to determine cost features for preparation of negotiating factors; monetary values; legitimacy of possession.

Some of these collections were put together clearly without tribal sovereign approval. To the extent that the federal government condoned and perhaps encouraged such activity whether by omission or commission, to that same extent should the federal government be liable.

Once more a Catch 22 situation arises wherein the Smithsonian must provide administration, direction, and impetus towards obtaining information which in many cases may be used against the federal government in a court of law due to complicity.

This would appear to greatly limit the full disclosure required to give tribal governments maximum bargaining positions. Clearly a conflict of interest and even more personally so wherein the Smithsonian Regents and personnel must retain much of what they now possess to assure appropriate levels of funding under the annual budget allocations.

It is not necessary to have two such organizations operating simultaneously in a stop-and-go manner.

If the Native American Museum Advisory Board should be empowered to secure provenances or inventories to their own satisfaction and 2) should make determinations at the outset as to which sacred articles (if any) and skeletal remains (if any) and other artifacts and collections relating to Native American history or culture remain at the Smithsonian adequate to the needs of that institution or any other institution and which will eventually be returned.

I was shown what I understand to be in 31,000 separate boxes the remains of Native Americans of various tribes at the Smithsonian. The cost of storage on an annual basis and custodial staff, as well as utilities could virtually be eliminated or, better yet, passed on to allow for reburial on the appropriate reservation.

The physical plant required to house these remains and artifacts in Washington, D.C., would be freed for other similar purposes rather than build added facilities. That savings could then be passed on to select tribes and reservations to build their own museums and depositories..

The Smithsonian's vested interest may cause them to delay or deny the return of much of their collection.

The role of those for Indian appropriations is to impound such allocations under forged ignorance or lack of authorities until [illegible] program plans be completed, [illegible] targeted, or inappropriate response or administration, then be provided to allocated [illegible] funds in order to return to business as usual. Therefore, the main concern must be to make HR [illegible] a strong and meaningful piece of legislation.

Now, while the way to organize this process is not at all difficult to propose (depending on whether Smithsonian or BIA bureaucratic appointed professionals or tribal authorities and their representative bodies such as the National Congress of American Indians or the National Tribal Chairmen's Association or duly authorized tribal spiritual leaders are allowed the main say for particular purposes).

It would seem that the only group properly deciding is the duly authorized tribal spiritual leaders.

To that end, we do support the main thrust of HR [illegible] from the introductory page forward to page 17, line 15 with these exceptions:

Items of Specific Concern

Page 4 - after line 18 and before line 19. We wish this group to remain separate and autonomous of any existing authority or bureaucracy to the largest extent possible as to and perhaps including direct responsibility to the President's office.

Page 5 line 2 add ". . . and the Executive Director of the National Congress of American Indians".

Page 7 line 9 - strike the words "Native American Center" as it leads here and later on in SECTION [illegible] (see changes in Section 12) that section.

Page 7 between lines 15 & 16 - add "The museum [illegible] which may promptly [illegible] Native American [illegible] and input in any case. For example, [illegible] Historic Preservation [illegible] the National Environmental Protection Act, and other similar acts related to contemporary Indian affairs.

Page 8 line 21 - add "in concurrence with recommendations of Executive Director who may at his/or her discretion refer that selection process to the Board".

Page 9 line 11-14 - How much?

Page 12 line 21-22 - Where?

Page 13 line 17-19 - 6 months? one year? 18 months?

Page 14 line 4 - strike ". . .during the 2 year period. . "
line 9 - "until such time as the settlement is completed.

Page 15 - after line 15 add:

(4) All private collections not utilizing federal funding shall be required to submit to the Native American Museum Advisory Board all articles of antiquity of Native American origin or suspected origin and upon payment of a fee not to exceed $ shall request that a certificate of authenticity be issued.

a) In the event that such articles are determined to be of communal or individual spiritual use, they would be purchased with funds collected from the fee pool or traded for articles of similar condition and/or value which are not directly or exclusively used in rituals, ceremonies, or Native American religious beliefs and practices.

b) after a certain time frame from the date of presidential ratification of SB2952 (5 years?) it shall be a crime for private parties to possess in whole or in part:

1) skeletal remains of Native Americans
2) sacred artifacts; punishable by a $5,000.00 fine and one year in jail for each sacred article in possession; said article shall be confiscated and returned to the proper source from which it originated.

c) If it has been determined that said artifacts were obtained by desecration of sacred sites either ceremonial or burial an additional penalty may be imposed not to exceed a $5,000.00 fine and one year in a federal penal institution.

It shall further constitute a criminal offense for any person to knowingly, willfully, and maliciously vandalize or desecrate any sacred Native American ceremonial or burial site punishment not to exceed a $5,000.00 fine and one year in a federal penal institution.

The previously stated amendment is requested to allow a grace period for registration of artifacts and authentication in order that private professional and amateur collectors or finders of artifacts may within a reasonable amount of time determine whether or not they possess articles for which they may be held in violation, receive recompense for said articles and, without fear of punishment, disclose where said artifacts were found.

After that liberal grace period of five years all trafficing in religious, ceremonial, sacred artifacts should cease except wherein new finds may be reported and compensation be received for said information.

Page 15 line 16 - the term "Native American Center be abolished unless it is used by the Native American Museum Advisory Board to denote a subordinate function.

Page 15 line 19 as above

Page 15 line 18 - strike "which shall be known as the" and replace with "which shall be subordinate to and function under the direction of the Native American Museum Advisory Board". (NAMAB).

Page 16 line 6-11 - not relevant to NAMAB.

Page 18 line 9 through 23 - strike in entirety.

Page 19 line 1-2 - strike and replace with the Director of the Native American Museum Advisory Board.

Page19 line 11-14 - strike in entirety but add later on at

Page 20 line 19-21 - and strike all presently stated and replace with all on Page 19 line 11-14.

Page 20 line 17 & 18 - strike Native American Center and replace with Native American Museum Advisory Board (NAMAB).

Prepared Statement Of Chief Earl Old Person Of The Blackfeet Tribe Of The Blackfeet Reservation

Mr. Chairman. The Blackfeet Tribal Business Council has authorized me to make this statement supporting S. 187, which provides for the protection of Native American rights to the remains of our dead and our sacred artifacts, and for the creation of Native American cultural museums. The Blackfeet Tribe is honored to testify on this matter before the Select Committee on Indian Affairs of the United States Senate.

The complexity of our laws relating to the care of human remains and sacred artifacts has never before been adequately recognized. We have many laws for these matters. These laws were given to us for the purpose of taking good care of these things. Then the beings in these things will help us after we have helped them. If these laws are not observed, the beings are not pleased and misfortune may befall all of us.

We have not spoken to the federal government about these matters in the past because we were very frightened. The Blackfeet Territory was one of the last places to be invaded by the Americans. Five times in the 19th Century over one-half of the members of the Tribe died because of disease and starvation. We thought none of us would survive. Our religion was outlawed and ridiculed. All of our suffering made us afraid to speak of these things. We thought the Americans had no respect for these matters.

This proposed bill provides a procedure for our laws to come alive again. We do not wish our skeletal remains and sacred artifacts to continue to be contaminated. When these things are touched and moved improperly, it damages the beings which are part of the skeletons and artifacts. There are proper ways to prepare to move these things. We wish for these things to be treated properly and returned to us. We believe this bill provides for this.

The Blackfeet Tribe is pleased by the provision for a Native American Museum Advisory Board which will conciliate disputes between the Indian and museum communities. We are all human beings and should be able to work out agreements for the care and return of skeletons and sacred artifacts.

The Blackfeet Tribe has been negotiating with the Smithsonian Institution for two years regarding the return of skeletons. We are not satisfied with the information we have received as it is not enough for us to identify the remains so that the families can be consulted. The Smithsonian Institution has offered to return some remains, with restrictions. We have not yet agreed to this. We do not yet know even the correct number of Blackfeet skeletons held by the Smithsonian Institution. We question the value of the further scientific studies which the Smithsonian proposes to do on the skeletons they are offering to return. We assume that this proposed bill will provide a process for the adequate resolution of our negotiations for those skeletons.

The Blackfeet Tribe supports this bill and encourages the Congress to enact it into law. S. 187 represents a turning point in the federal treatment of Indians. The proposed bill recognizes the spiritual and cultural needs of Indian people. Enactment of this law will demonstrate to the indigenous communities throughout the world that the government of the United States of America knows how to ensure the continuing exercise of religious freedom for the Native American religions.

PREPARED STATEMENT OF NELSON WALLULATUM, RELIGIOUS LEADER AND CHIEF OF THE WASCO TRIBE, AND TRIBAL COUNCIL MEMBER, THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

My name is Nelson Wallulatum. I am Chief of the Wasco Tribe, one of the three Tribes making up the Confederated Tribes of the Warm Springs Reservation of Oregon. With me is Delbert Frank of the Warm Springs Tribe, a fellow Tribal Council member who is Vice Chairman of the Mid-Oregon Indian Historical Society.

We are here to express support for S. 187, the Native American Cultural Preservation Act.

I would like to give you some idea of why the protection of human remains and sacred objects is especially important to Indian people. We, like you, have a natural human reaction when the remains of our ancestors are removed and studied. You should remember that some of the remains that we are talking about may be less than one hundred years old. You can imagine your dismay if Thomas Jefferson's bones were removed from his grave and displayed on a museum shelf. You would even feel more strongly if he were your great-grandfather. Many of the remains now held by the Smithsonian are my relatives or the relatives of my people, and as Chief of the Wasco Tribe and as a community religious leader, they are my direct responsibility.

Apart from this universal reaction, Indian people have some special beliefs that make this issue important to us. All Tribes have ceremonies for the deceased at the time of death. The ceremonies are of a religious nature and are normally carried on continuously for a period of several days. Within the Tribes there are only certain persons who are permitted to handle the bodies of the deceased. Those are people who have the necessary religious attributes. This is so because the bodies must be handled properly in preparing them to make the journey to their Creator. One aspect of the ritual is the dressing ceremony. In this ceremony, the last bath is given to the deceased in the evening and the deceased is dressed in pure material that has not been soiled or used, since they would be worn when the deceased met the Creator.

Even after the funeral ceremony is completed, the Tribes still believe that the deceased person remains a part of the living. Because there is an ongoing relationship with the deceased, the Tribes retain an interest in the remains of the deceased. The Tribes attempt to physically keep their people, both living and deceased, together. It is common for Tribes to remove the remains of their people to a common area so that the Tribe can remain together. When the remains are removed, the same religious rituals are observed. For example, the remains of the deceased will again be dressed in pure materials for their removal, even if there are only a few bones left. Again, only those religious leaders who are qualified may handle the remains at the ceremonies.

For example, recently the remains of Jake Thomas, a Wasco scout who had died in Yakima, Washington, about a hundred years ago, were removed to the Warm Springs Reservation. He served as a scout for the United States and was regarded as a great warrior by the Wasco people.

Although Jake Thomas's remains were of relatively recent origin, the mere passage of time does not decrease the responsibility that the Tribes feel towards the deceased. Several years ago, the remains of our ancestors found at an archeological site in Oregon were returned to be with our people. The same religious ceremonies were used for the remains of these people who died six or seven hundred years ago as would be used for those people who had died ten years ago. This excavation and eventual reinterment were done with close cooperation between the Tribes and archaeologists. Oregon law carefully protects the Tribes when archeological excavations are involved. However, they do not give us assistance when the remains or sacred objects are in the hands of the Smithsonian Institution or other museums.

Sacred objects are often found with human remains and are also given special treatment. These artifacts, such as spear points, stone tools and beads, are often artifacts that were given to the deceased to equip him or her for the journey to meet the Creator. It is also important that these artifacts are handled correctly.

We understand that there are competing scientific interests that will be considered by Congress. For the most part, we believe that the religious and social interests to be protected are of far greater importance. Certainly, important scientific information could be obtained from the excavation of a Colonial cemetery in Boston, probably even more than by excavating the more recent remains of my ancestors. However, no archeologist would consider making such a proposal. We believe that legislation such as that before you today is a step in the right direction to give Indian remains and sacred objects the respect which is their due.

Thank you.

Prepared Statement Of Lionel John

Good morning, Mr. Chairman, members of the Committee, and staff. My name is Lionel John. I am the Executive Director of the United South and Eastern Tribes, Inc. and a number of the Seneca Indian Nation of New York.

USET is an inter-tribal organization composed of sixteen member tribes located in nine states along the south and eastern seaboard from Florida in the south to Miane in the north. USET, headquartered in Nashville, Tennessee, was founded in 1968 and is dedicated to promoting the economic, cultural and social welfare of its member tribes.

The UNITED SOUTH AND EASTERN TRIBES have several concerns with the current bill and we would like to suggest some changes.

Our recommendations are as follows:

1. On page 5 line 25 of S. 187, it states that the term of office for members of the Native American Museum Advisory Board "shall be 3 years." On page 6, line 1, the term is stated to be 4 years. Page 5, line 25 should be amended to conform to the 4 year term provided for on page 6.

2. On page 3, Sec.3.(5(A) the term "Indian Tribe" is defined to include State recognized and terminated tribes as well as Federally recognized tribes. There are widely varying standards among the states as to what constitutes a Tribe. In the State of Alabama, for examble, a group which is basically a boy scout troop has been designated as a tribe.

Our concern is that a Federally recognized Tribe which has maintained its culture and which is legitimately concerned with the human remains and sacred artifacts of its ancestors might have a conflicting claim to that of a loosely associated State recognized tribe or a tribe which may no longer maintain its culture or religious practices as a consequence of being terminated. There are Choctaw burial sites in Alabama and in other southeastern states. The current successor tribes of the Choctaw Nation are in Mississippi and Oklahoma. The bill should be specifically amended to afford Federally recognized tribes who are successors in interest to aboriginal tribal groups primacy in claims for the return of human remains and sacred artifacts in instances where conflicting claims are made by Federal and State recognized tribes or terminated tribes or bands.

3. On page 4, Sec. 3.(10), the term "sacred artifact" is defined as "any material which is devoted to, or dedicated to, a deity or some Native American religious purpose and utilized for the conduct and observance of Native American religion by an Indian tribe or by any individual who is a Native American."

We very strongly recommend that this definition be broadened. Virtually all of the USET member tribes follow a religious practice of interring baskets, clothes, masks, tools, hunting implements, jewelry and other items with their dead. These items while not always used in ongoing religious ceremonies, are deeply sacred objects by virtue of having been buried with the dead. These items are essential for the deceased to make his or her way in the spirit world. If these items are removed from their graves, the spirit cannot be at rest and the spirit is unhappy and causes harm and ill fortune to the living.

The provenance which is required to be prepared pursuant to Sec. 6 should specifically be required to specify which artifacts (regardless of their nature or type) were removed from a burial mound or other burial site. The term "sacred artifact" should be amended to include such burial objects given their deep religious and spiritual signifigance.

4. Sec.4. provides for a 17 member Advisory Board, six of whom are to be Indian. Given the widely differing religious practices and cultures among the respective tribes and Native Alaskan groups we feel this number isn't sufficient to represent this diversity. We would recommend that the number of Indians on the Board be increased to at least 10 and that the bill specify that this membership be as diverse as possible in familiarity with the cultural and religious practices of the respective tribal and Native Alaskan groups.

5. Sec. 5.(e) provides that determiniations of the Advisory Board shall be final and not reviewable in any court. One of our member Tribes, the Tunica-Biloxi Tribe of Louisiana, recently won a court case for the return of 2.5 tons of artifacts. We feel that Tribes should be able to have the option of proceeding in Court or pursuant to the provisions of this legislation. We therefore recommend that a savings provision be added to the bill stating that this Act is not intended to affect and pre-existing treaty or other legal rights that any tribe might have.

USET commends this legislation and urges that it be acted upon with appropriate changes as early as possible. We thank you for the opportunity to present our views on this most important legislation.

NATIONAL CONGRESS OF AMERICAN INDIANS

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

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Menominee Tribe

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Cherokee Nation

NORTHEASTERN AREA
Rovena Abrams
Seneca Nation

PHOENIX AREA
Thomas R. White
Gila River Indian Community

PORTLAND AREA
Allen V. Pinkham, Sr.
Nez Perce Tribe

SACRAMENTO AREA
Denis Turner
Rincon Band of Luiseno

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

February 20, 1987

The Honorable John Melcher
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

On behalf of the National Congress of American Indians, the oldest and largest national organization serving the interests of American Indian and Alaska Native governments and people, we thank you for your leadership in bringing to public attention the disgraceful situation of hundreds of thousands of Indian skeletal remains and associated grave goods and sacred objects stored in museums, universities and other institutions in the United States and other countries.

The Native American Cultural Preservation Act, S. 187, is a bold step forward in attempting to bring justice to Native peoples, and we are certainly in agreement with the bill's stated goal of protecting Native American rights to the remains of our relatives and our sacred materials. We strongly encourage the Senate Select Committee on Indian Affairs to hold field hearings on this legislation. These are most sensitive matters, and the Members of this Committee would benefit greatly from the opportunity to meet, both in public hearings and private meetings, with a broad range of Native elders and traditional leaders. This subject is often difficult to discuss, and indeed in many circumstances and in Native traditions many specifics cannot be discussed; some will not be discussed without guarantees of confidentiality, and it is a subject which is not to be discussed casually in public.

The National Congress of American Indians would like this letter to be made a part of the official hearing record. We also will submit within the two-week period that the record remains open a more detailed statement on S. 187 and on the subject of repatriation of Indian remains and sacred objects generally. We also will report on our communications with Smithsonian officials and on the research we have done in that Institution.

Although there is great diversity in the religious traditions of the Indian and Native nations, there is a generally held belief among Indian and Native people that, when an individual dies and the remains of that individual are given the proper ceremonial treatment, the remains and any sacred objects that are placed with the remains are intended to be left undisturbed by human activity forever. This belief is not one which is unique to Indian peoples. That this belief also is held by practioners of Judeo-Christian religions is reflected in laws in every state of the Union which impose criminal penalties on persons who desecrate cemeteries. Only in very recent years have states begun to enact laws to prohibit the excavation of unmarked cemeteries and to provide for the reburial of human remains which are unearthed. Federal law, however, still provides little protection for unmarked Indian burial sites on federal property and instead classifies human remains and grave goods as "archaeological resources" and holds them to be the property of the federal government. Indian and Native peoples are deeply offended that the graves of our people have not been protected by the laws of the dominant society, and that the excavation of the graves of our people has become a major activity of a widely respected profession, archaeology.

Perhaps the most widespread burden on religious beliefs and practices arises from the denigration of Indian and Native religious beliefs that is implicit in the practice of curation and display of human remains and grave offerings. The unspoken message to Indian and Native people is that the profession of archaeology is more important than our practice of religion. Many Indian religious traditions hold that the grave offerings which are interred with the remains of an individual belong to that individual and are necessary for his or her well-being in the next world, and that desecration may jeopardize the well being of people in this world.

We are in agreement with the testimony of the Native American Rights Fund that any solution to the problem of institutions holding Indian skeletal remians and other sacred objects must have as its premise the fundamental right of ownership of Indian people to the graves of our ancestors. This is a fundamental human right, one which is protected by the First Amendment and further highlighted by the policy statement in the Indian Religious Freedom Act which imposes a procedural requirement on federal agencies to consider the impact of administrative actions on Native religious belief and practice and which states that the policy of the United States "is to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of American Indians, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional ritnes. (Emphasis added)

An alternative approach to establishing a new institution, the Native American Museum Advisory Board as envisioned in S. 187, to mediate disputes between tribes and institutions over repatriation requests is to amend Section 5 of the Archaeological Resources Protection Act to require the Secretary of Interior to develop regulations, in consultation with Indian tribes and traditional leaders, to establish a process for return of sacred materials, including human remains, to the tribe of origin. The regulations would be required to take into account the American Indian Religious Freedom Act.

Attached is a copy of the comments recently filed by our organization in response to a pre-publication draft of the proposed Department of Interior rule for "Curation of Federally Owned and Administered Archaeological Collections". We recommend that the United States enter into cultural property agreements with Indian nations, similar to those it is party to at this time with others in the world community of nations. We also recommend that the Department of Interior use a process called "regulatory negotiations" to develop a proposed rule on the disposition of archaeological collections found on Indian and public lands. This rule is directly related to the subject of S. 187, and we believe it could become the foundation for federal policy regarding repatriation of Indian skeletal remains and associated grave goods and archaeological collections. We commend the attached paper to you, and believe it will be instructive when considering the Native American Cultural Preservation Act.

Thank you for your leadership in advocating on behalf of Native peoples in this most sensitive matter. We look forward to working with you on this bill as it evolves and moves through the legislative process.

Sincerely,

Suzan Shown Harjo
Executive Director

Enclosure

NATIONAL CONGRESS OF AMERICAN INDIANS
Est. 1944

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Suzan Shown Harjo
Cheyenne & Creek Nations

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[illegible]
Northern Arapahoe Tribe

JUNEAU AREA
[illegible]

MINNEAPOLIS AREA
[illegible]
Menominee Tribe

MUSKOGEE AREA
[illegible]
Cherokee Nation

NORTHEASTERN AREA
[illegible]

PHOENIX AREA
[illegible]

PORTLAND AREA
[illegible]

SACRAMENTO AREA
[illegible]

SOUTHEASTERN AREA
[illegible]

February 11, 1987

Dr. Bennie C. Keel
Departmental Consulting
 Archaeologist
National Park Service
Department of the Interior
Room 4127C
1100 L Street, N.W.
Washington, D.C. 20013

Dear Dr. Keel:

Enclosed for your consideration are comments of the National Congress of American Indians on the review draft of proposed rules for the "Curation of Federally Owned and Administered Archaeological Collections," which are to be codified as 36 CFR Part 79.

As the comments clearly state, this is a subject matter about which American Indian and Alaska Native people have intensely held religious beliefs. We sincerely hope that you will accept our recommendation to enter into consultation regarding this proposed rule prior to publication in the Federal Register.

Sincerely,

Suzan Shown Harjo
Executive Director

804 D STREET N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

COMMENTS ON THE REVIEW DRAFT, DATED SEPTEMBER 12, 1986 PROPOSED RULE FOR THE "CURATION OF FEDERALLY OWNED AND ADMINISTERED ARCHAEOLOGICAL COLLECTIONS"

SUBMITTED BY:
THE NATIONAL CONGRESS OF AMERICAN INDIANS
804 D STREET, NE
WASHINGTON, D.C. 20002
202-546-9404

FEBRUARY 11, 1987

ABSTRACT

This proposed rule is of great importance to American Indian and Alaska Native people. Indian and Native people have religious interests, ownership interests and interests as units of government which will be affected by this proposed rule. The nature of these concerns is discussed in these comments. Although the review draft begins to address some of these concerns, it is still in need of major revisions. In these comments, the National Congress of American Indians (NCAI) recommends that the Department of the Interior use a process called "regulatory negotiation" to develop a proposed rule which is more responsive to Indian and Native concerns. NCAI would be willing to perform a lead role in such regulatory negotiation.

NCAI strongly opposes the existing "Guidelines for the Disposition of Archaeological and Historical Human Remains," which the review draft would adopt as an appendix to the proposed rule. These "Guidelines" would violate the First Amendment to the U.S. Constitution and were issued without compliance with the requirements of the Administrative Procedure Act and the American Indian Religious Freedom Act. These "Guidelines" must be withdrawn and an appropriate new policy adopted through the process of promulgating this rule. The new policy would be a major component of this proposed rule, and regulatory negotiation would be the most productive process to use in developing this component of the proposed rule. There are also complex issues of ownership which are not adequately addressed in the review draft. The resolution of these issues must be accomplished in light of tribal traditional and customary law and lawmaking authority. Regulatory negotiation would be an appropriate way to begin to resolve these issues.

COMMENTS ON THE REVIEW DRAFT, DATED SEPTEMBER 12, 1986
PROPOSED RULES FOR THE
"CURATION OF FEDERALLY OWNED AND ADMINISTERED ARCHAEOLOGICAL COLLECTIONS"

SUBMITTED BY:

THE NATIONAL CONGRESS OF AMERICAN INDIANS
804 D STREET, NE
WASHINGTON, D.C. 20002
202-546-9404

FEBRUARY 11, 1987

INTRODUCTION

The National Congress of American Indians (NCAI) is the oldest and largest national organization serving the interests of American Indian and Alaska Native governments and individuals. NCAI was founded in 1944, in Denver, Colorado, when eighty delegates representing 45 Indian governments from most regions of Indian country came together at their own expense and created a national organization to advance their common interests. Today, more than 150 Indian and Native governments are active members of NCAI, and more that 75% of all Indian and Native governments have standing NCAI membership resolutions, representing more than 850,000 Indian and Native people nationwide.

American Indian and Alaska Native peoples have many concerns regarding the subject matter of these rules. In NCAI comments of January 23, 1986, on the notice of intent to propose these rules, we advised your office of the nature of Indian and Native concerns, which include religious, property and governmental rights and interests. While the review draft begins to address some of these concerns, and while we appreciate this preliminary step, there are serious deficiencies in the document which should be corrected prior to the publication of the notice of proposed rulemaking.

In each year since its founding, NCAI has conducted an Annual Convention, which has been a deliberative forum in which Indian and Native leaders have discussed their concerns and have adopted resolutions expressing consensus positions on important issues. During the recent 43rd Annual NCAI Convention, which was held in Phoenix, Arizona, September 22-26, 1986, two resolutions were adopted which are directly relevant to this proposed rule. These resolutions are entitled, "Resolution Condemning Interior's Policy on Human Remains and Sacred Objects, Which Was Developed Without Tribal Consultation" (Number 43-86-51) and "Resolution Regarding the Excavation and Curation of Human Remains and Sacred Objects, Protection of and Access to Sacred Sites, and the Comprehensive Revision of Relevant Federal Laws and Policies" (Number 43-86-57). A copy of each is included with these comments. Indian and Native people have deeply held religious beliefs that would be affected by this rule, and the intensity of these beliefs is reflected in these two resolutions.

It is important for a rule to be promulgated governing the curation and ultimate disposition of archaeological collections that are in the possession of federal agencies and those that are in the possession of non-federal entities as a result of the issuance of federal permits. We note that it has been seven years since the enactment of the legislative authority for this rule in the Archaeological Resources Protection Act of 1979 and six years since the enactment of the legislative authority in the National Historic Preservation Act Amendments of 1980. We realize that if the recommendations we make in these comments were accepted and acted upon by the Department of the Interior, the promulgation of a final rule would be further delayed. While we regret this delay, we note that it is not only important to have a final rule, but also to have a good final rule, one that is consistent with the guarantee of religious freedom contained in the First Amendment to the United States Constitution. We believe that a rule can be crafted that will be responsive to our concerns, and we hope that this will be the eventual outcome of this rulemaking. However, if in our judgment the final rule is not consistent with the First Amendment, we will seek judicial review.

Because our comments are concerned primarily with the scope of this rulemaking and the policy which it would establish, we begin with a discussion of the authority upon which it is based.

AUTHORITY

The authority for this proposed rule is found in section 5 of the Archaeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. section 470dd) and section 107 (a)(7)(A) of the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. 470a (a)(7)(A)). Section 107 (a)(7)(A) of NHPA, which is paraphrased in section 79.2(a) of the review draft, states:

> The Secretary shall promulgate, or revise, regulations--
>
> (A) ensuring that significant prehistoric and historic artifacts, and associated records, subject to section 470h-2 of this title [section 110 of the NHPA], the Act of June 27, 1970 [the Reservoir Salvage Act], and the Archaeological Resources Protection Act, are deposited in an institution with adequate long-term curatorial capabilities.

Section 5 of ARPA, which is paraphrased in section 79.2(b) of the review draft, states

> The Secretary of the Interior may promulgate regulations providing for--
>
> (1) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this Act, and
>
> (2) the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 [the Reservoir Salvage Act] or the Act of June 8, 1906 [the Antiquities Act].
>
> Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands. Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulation shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.

We quote these statutory provisions at the beginning of our comments to make clear our understanding that, when the Congress included these provisions in ARPA and NHPA, it was concerned primarily with the long-term curation of artifacts and other materials that it has seen fit to include within the definition of the term "archaeological resources." However, the language in section 5 of ARPA speaks not only of "curation," but also of "ultimate disposition." It is this "ultimate disposition" which is our primary concern with this proposed rule.

This rule can and should be the mechanism for establishing a federal policy which provides for the repatriation to Indian tribes of sacred objects and human remains for treatment in accordance with tribal religious beliefs and practices. The existing "Guidelines for the Disposition of Human Remains," which the review draft would codify as an appendix to this rule, must be withdrawn. These "Guidelines" were established by the Assistant Secretary of the Interior for Fish and Wildlife and Parks without consultation with Indian and Native governments and religious leaders and without publication in the Federal Register for review and comment. These "Guidelines" constitute a "substantive rule," as the term is used in the Administrative Procedure Act, since there is statutory authority for such a rule in section 5 of ARPA, and because this proposed rule will implement the statute. *See* Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking* (1983), at 34. Since constitutional rights are affected by these "Guidelines" it is neither an "interpretive rule" nor a "general statement of policy," and thus is not exempt from the notice and comment requirements of section 553 of the Administrative Procedure Act. If the "Guidelines" are not withdrawn, NCAI Resolution Number 43-86-51 recommends litigation to have them invalidated through judicial review.

This rulemaking can be used to promulgate a rule that will be more sensitive to Indian and Native concerns and that will not burden religious beliefs and practices. There is ample authority for establishing such a rule, given the language regarding ultimate disposition in section 5 of ARPA, and given the established principles of statutory construction. On the reconciliation of apparently conflicting language of ARPA and the NHPA Amendments of 1980, we refer you to Comment, "Archaeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act," 15 Environmental Law 413 (1985), at 431-444. The legislative authority quoted above must also be read in conjunction with the American Indian Religious Freedom Act (AIRFA) of 1978 (P.L. 95-341, codified in part at 42 U.S.C. 1996) and the First Amendment to the United States Constitution. Because the positions advanced in these comments are based upon these authorities, we quote some of the relevant language at this point.

The First Amendment includes two clauses that are concerned with religion. These clauses, which are known as the "establishment clause" and the "free exercise clause," state: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

This language has been interpreted in a great many decisions by the U.S. Supreme Court and other federal courts. One of the leading cases is Sherbert v. Verner, 374 U.S. 398 (1963), in which the Supreme Court ruled that governmental action which constitutes an infringement of religious freedom is constitutionally permissible only in cases in which the federal government has a compelling interest. The application of this standard to cases involving American Indian religious freedom is discussed in several law review articles, including Pepper, "The Conundrum of the Free Exercise Clause -- Some Reflections on Recent Cases," 9 N. Ky. L. Rev. 265 (1982); Suagee, "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers," 10 Am. Indian L. Review 1 (1982); and Note, "Native American Free Exercise Rights to the Use of Public Lands," 63 Boston U. L. Rev. 141 (1983). In one of the recent cases involving Indian religious freedom, the U.S. Court of Appeals for the District of Columbia Circuit stated the test of constitutionality as follows:

> The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner.

Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied sub nom. Navajo Medicine Mens Ass'n v. Block, 464 U.S. 1056 (1984). It is thus a three-part test, in which the plaintiff must first show that the federal action challenged constitutes a "burden" on religion. If a burden were demonstrated, then the federal government must show a compelling and, if this showing were met, that it could not be achieved by less restrictive means. In Wilson, the court did not find a burden on religion, so it did not reach the second and third parts of the test. However, in another recent case in which the U.S. Forest Service planned to construct a paved logging road in a national forest of religious significance to traditional Indian religious practitioners, the Ninth Circuit Court of Appeals did find a burden on religion. When the court did not find the federal government's interest compelling, it enjoined the U.S. from completing the road. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *affirmed on rehearing*, 795 F.2d 688 (1986).

In 1978, Congress recognized that the implementation of federal laws and policies has often infringed upon the religious prerogatives of American Indian peoples despite the guarantee of religious freedom contained in the First Amendment. This recognition culminated in the enactment of the American Indian Religious Freedom Act (AIRFA) of 1978. Representative Morris K. Udall expressed the congressional intent that the compelling governmental interest standard is to be applied when Indian religious freedom is at stake, stating:

> It is the intent of this bill to insure that the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administration that such religious practices must yield to some higher consideration.

Cong. Rec. H6872 (1978). Quoted in Federal Agencies Task Force, *American Indian Religious Freedom Act Report, Pub. L. 95-341* (1979), at Appendix A, p. 3.

AIRFA was enacted as a Joint Resolution and is comprised of ten "Whereas" clauses and two "Resolved" sections. Only the first "Resolved" section is codified, which states:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, *use and possession of sacred objects*, and the freedom to worship through ceremonials and traditional rites. [Emphasis added.]

Since the remainder of AIRFA is not codified, we have included a copy with these comments for your convenience. Some of the non-codified provisions are particularly relevant to this rulemaking, including the following "Whereas" clauses:

> Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;
>
> * * *
>
> Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and values systems;
>
> * * *

> Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;
>
> Whereas such infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;
>
> Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;
>
> Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;
>
> Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

* * *

Finally, the second "Resolved" section states, in part:

> Section 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. [Emphasis added.]

In our previous comments we noted that rules governing the curation of archaeological resources might not be consistent with the guarantee of freedom of religion in the First Amendment to the U.S. Constitution and the policy established by AIRFA. We also noted that at least one federal Court of Appeals has determined that AIRFA imposes a requirement on federal agencies to "evaluate their policies and procedures with the aim of protecting Indian religious freedom" and to consult with Indian organizations in regard to proposed actions. Wilson v. Block, supra. See also New Mexico Ranchers Ass'n v. Interstate Commerce Comm'n, 702 F.2d 227 (D.C. Cir. 1983) and Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 597-98 (N.D. Cal. 1983). As stated by Walter Echo-Hawk in his recent article "Museum Rights vs. Indian Rights: Guidelines for Assessing Competyeing Legal Interests in Native Cultural Resources," 14 Review of Law and Social Change 437 (1986), at 452:

> Although AIRFA does not impose any additional substantive religious rights beyond those already within the ambit of the free exercise clause of the first amendment, the courts have held that the Act does impose a procedural requirement to consider the impact of administrative actions on Native religious belief and practice.

Thus, we recommended that the Department of the Interior make a sincere effort to inform and consult with tribal governments and Indian traditional religious leaders throughout the rulemaking process. Unfortunately, this recommendation has apparently been disregarded. Although we appreciate the opportunity to comment on the review draft, we do not believe that this is adequate consultation, and the lack of adequate consultation is reflected in the draft document. Nor do we consider the participation of the Departmental Consulting Archaeologist in a panel discussion at the 43rd NCAI Annual Convention to have been consultation of any kind, although we were glad to have had his participation and views.

We continue to believe that consultation is needed. We further believe that consultation should be accomplished prior to publication of the notice of proposed rulemaking.

The consultation that is needed could be accomplished through a process known as "regulatory negotiation." This is a process has been used by a few federal agencies and has been endorsed by the Administrative Conference of the United States. As described in A Guide to Federal Agency Rulemaking, at page 97:

> The increased formalization of agency rulemaking, and the polarization of viewpoints that often occurs in complex rulemaking proceedings, have stimulated the search for alternative ways to conduct rulemaking. One approach, supported by the Administrative Conference, is regulatory negotiation. Regulatory negotiation involves the convening of a group representing all the interests that would be affected by an agency rule on a particular subject. The group is asked to attempt to negotiate issues, with the goal of adopting a consensus proposal that will be published as the agency's notice of proposed rulemaking. Thus, regulatory negotiation is not an alternative to notice and comment rulemaking, but rather is a step in that process. [Emphasis added.]

There is a polarization of viewpoints regarding the subject matter of this rule, especially the provisions that are concerned with the ultimate disposition of human remains and other sacred materials which are considered "archaeological resources" subject to this rule. Thus the disposition and repatriation provisions would seem to be appropriate for regulatory negotiation. The provisions of the rule that are concerned with curation standards could be separated from the provisions concerned with disposition and repatriation. NPS could then proceed through the notice and comment phase of rulemaking with regard to curation standards, with appropriate sections being reserved for the provisions concerned with disposition and repatriation. If the option of regulatory negotiation is to be pursued regarding the disposition and repatriation issues, it should be done prior to the publication of a notice of proposed rulemaking, in order to avoid problems of *ex parte* communication.

Given the degree of polarization between the archaeological community and the Indian and Native community, it is perhaps not likely that regulatory negotiation will yield a consensus proposed rule. However, even if no consensus were to emerge, it is likely that some common ground would be established and that the distance between the polarities could be reduced. This would increase the likelihood that various interests would accept the final rule which eventually would be promulgated.

If you agree with our recommendation that regulatory negotiation would be a productive approach to promulgating a rule for the disposition and repatriation of human remains and sacred objects, the educational affiliate of NCAI, the NCAI Fund, could serve as a mechanism for bringing together the Indian and Native participants in a group convened to develop a proposed rule. We would be pleased to meet with Interior Department officials to explore the options.

GENERAL COMMENTS

We have three general areas of concerns with this rule: religious freedom concerns, ownership concerns and concerns regarding the interests of Indian and Native peoples as governments.

Religious Freedom Concerns

There is no point in trying to overlook the fact that the subject matter with which this rule is concerned is one in which there is a fundamental conflict between Indian peoples and the archaeological community. *See generally* the articles by Echo-Hawk and Suagee cited earlier and the references cited therein. Although there is great diversity in the religious traditions of the Indian and Native nations, there is a generally held belief among Indian and Native people that, when an individual dieds and the remains of that individual are given the proper ceremonial treatment, the remains and any sacred objects that are placed with the remains are intended to be left undisturbed by human activity forever. This belief is not one which is unique to Indian peoples. That this belief also is held by practitioners of Judeo-Christian religions is reflected in laws in every state of the Union which impose criminal penalties on persons who desecrate cemeteries. Only in very recent years and in only a handful of states have laws been enacted to prohibit the excavation of unmarked Indian cemeteries. Indian and Native people are deeply offended that the graves of our people have not been protected by the laws of the dominant society and that the excavation of the graves of our people has become a major activity of a widely respected discipline, 'archaeology.'

The excavation of graves and the curation and display of human remains and sacred objects taken from graves is more than offensive. These practices place burdens on the religious beliefs and practices of Indian and Native people. The nature of these burdens is varied, and we make no pretense of describing the full range of burdens in these comments. The few examples given here will begin to illustrate the nature of these burdens. If the Department accepts our recommendation to pursue regulatory negotiation, the Indian and Native participants in a group convened for that purpose could provide many additional examples.

Perhaps the most widespread burden on religious beliefs and practices arises from the denigration of Indian and Native religious beliefs that is implicit in the practice of curation and display of human remains and grave offerings. The unspoken message to Indian and Native people is that the profession of archaeology is more important than our practice of religion. We know of at least one Indian religious leader who has decided to have his body cremated, even though this is contrary to the traditions of his tribe, because he is afraid that at some future time his remains would be excavated by archaeologists. This example is illustrative of the burdens on the deceased as well as the living. Many Indian religious traditions hold that the grave offerings which are interred with the remains of an individual belong to that individual and are necessary for his or her well-being in the afterlife. Separating the grave offerings from the remains of the individual may prevent the deceased from safely passing into or remaining in the next world. The spirit of such a person may become trapped between this world and the next, and such trapped spirits are widely believed to cause problems for the people of this world who encounter them. Whether or not scientists accept the validity of these beliefs is beside the point. Whether or not the living descendants of excavated ancestors have standing to challenge federal actions which may burden religious beliefs and practices of deceased ancestors is also beside the point. Present day Indian and Native people are discouraged from practicing traditional ceremonies for burial of the dead, and this is a burden on religion.

Another example of the nature of the burdens placed on religion can be seen in the statements made by Louise Javier, a medicine woman of the Tohono O'odham Nation during the Cultural Concerns Commission meeting at the 43rd NCAI Annual Convention. She spoke about the remains of ancestors of her Nation that are on exhibit at one of the state-supported museums in Arizona. She spoke about these ancestors as if they were still alive. She said they call to her and ask her to bring them home, and she has, accordingly, spent a great deal of her time in efforts to bring them home for reburial. One aspect of the burden on religion in this case is that a medicine person is a religious leader who performs many functions in an Indian or Native community. When a medicine person is forced to spend a great deal of time trying to arrange for the return of human remains for reburial, the community is, as a result, substantially deprived of the services of that person.

Another example of the kinds of burdens on religion concerns sacred objects which are not grave offerings, but rather which were made for ceremonial purposes. In some cases these objects have been kept by a religious leader but may have been lost or stolen. In other cases, sacred objects may have been placed at sacred sites to be retrieved on certain occasions and used in ceremonies. In other cases these objects may have been placed at sites with the understanding that they would decay through the forces of nature or that they would be retrieved for a later ceremony. Some of these sacred objects have come into the possession of museums and federal agencies. The refusal of federal agencies and museums to return such objects upon request to Indian and Native people means that the ceremonies for which the objects were made can no longer be performed, or can be performed in only a limited way. If the objects were intended to decay through the forces of nature or to be retrieved later, the ceremony has been disrupted. Indian and Native religious leaders could provide more specific examples of such cases and the resultant consequences.

A general conclusion is inescapable. There is a community of interest that seems to value scientific practices more than Indian and Native religious practices. We believe that this value judgment is wrong, and that federal policy reflecting or condoning this value judgment is unconstitutional. We believe that the federal policy should be that human remains and grave goods which have been excavated and are now in the possession of federal agencies or museums which gained possession through federal action must be returned to the appropriate Indian or Native peoples for reburial or other appropriate ceremonial treatment. We realize that we are challenging the premise of the archaeological community that "the sanctity of [this] scientific data, and the inappropriateness of destroying it, or destroying potential access to it." (P. Quick, "Changing Roles for the Anthropologist: Current Work Among Native Americans in North America," paper presented at the annual meeting of the American Anthropological Association, Washington, D.C., Dec. 1982.)

We also realize that the desecration of Indian and Native cemeteries would likely have been more extensive, were it not for federal legislation enacted to protect archaeological resources. The archaeological community has been successful in having its interests recognized in federal statutory law. The illegal looting of Indian graves and other sacred sites on public and Indian lands by professional "pot hunters" is an outrageous problem which no doubt would be worse if it were not against the law. Nevertheless, Indian and Native people reject the very idea that the remains of our people and their grave offerings should be considered to be "archaeological resources." See NCAI Resolution Number 43-86-57.

Archaeology is a professional discipline, not a religion. The First Amendment protects religious beliefs, not the fundamental beliefs of members of professional disciplines. If the policy of the United States, which is to be established by the Secretary of the Interior through this rulemaking, is to be that the interests of archaeology will prevail over the religious freedom of Indian and Native peoples, the

First Amendment requires that the federal government demonstrate a compelling interest in such a policy which cannot be achieved in some way that does not burden religious beliefs and practices. The review draft gives no indication of having considered the constitutional dimensions of this rulemaking.

Ownership Interests

There are issues regarding the ownership of excavated materials which are not addressed in the review draft. There are two general issues that should be addressed in this rule. First, there is the matter of whether archaeological resources located on allotted Indian land should be considered the communal property of the Indian nation or the individual property of the Indian allottee(s). The language of section 5 of ARPA states that any exchange or ultimate disposition of archaeological resources removed from Indian land shall be subject to the consent of "the Indian or Indian tribe which owns or has jurisdiction over such lands." With regard to allotted Indian lands, this language is ambiguous, since most allotted Indian lands are subject to the jurisdiction of an Indian government. The review draft repeats the ambiguous statutory language at several points: 1(b), 2(b), 3(b)(2), 5(a)(6), 5(a)(7), 5(b), 6(c), 6(d)(1), 7(a)(1), 8(c)(5), 8(c)(7)(iii), and 8(e)(2)(iii). In the uniform rules promulgated pursuant to section 10(a) of ARPA, identical statutory language was clarified in the rules by changing it to read: "the Indian landowner and the Indian tribe having jurisdiction over the lands." See 43 CFR section 7.9(c). However, this language would not provide sufficient clarification for this rule, since there is a question of ownership and the owner of an object cannot be both the Indian individual and the nation in most cases, but both may be owners in some cases.

This rule should provide a means for determining Indian ownership. This would allow the ambiguous language, at least in most instances, to be replaced with a terms such as "Indian owner." Matters of ownership are discussed in detail in the article by Echo-Hawk, cited earlier, and we commend it to your attention. Several cases are cited in this article supporting the principle that the matter of whether an object is communal property or individual property is to be determined according to the tribal laws, traditions and customs. Thus, the determination of ownership pusuant to this rule should provide for deferrence to tribal laws and customs. If the rule gives rise to an interpretation that consent is needed only from an allotted landowner, but the laws and customs of the tribe provide for communal ownership, serious problems could result. As Echo-Hawk states (at page 444):

> [M]useums cannot assume that they have valid title to Indian cultural property merely because they are good faith purchasers of items originally sold by individual Indians. Where tribal law indicates that the individual Indian seller had no title to communal tribal property, the Indian claimants have a legal right to demand return of the property regardless of the date of unauthorized sale.

Although Echo-Hawk was addressing the purported sale of cultural property, the same principles would apply to an individual Indian consenting to curation or disposition of cultural property which is, according to tribal law, tribal communal property.

The second issue regarding ownership concerns Indian cultural property that has been excavated from public lands. Although ARPA asserts that "archaeological resources" located on public lands are the property of the United States, there is a potential dispute between Indian nations and the United States when the "archaeological resources" are the remains of ancestors and grave goods. There is authority for the proposition that Indian nations have standing to assert control over the ultimate disposition of the remains and burial goods of their ancestors on public lands, particularly where Indian nations did not voluntarily abandon their burial grounds and where the federal government treats such remains differently from the remains of other peoples. See Echo-Hawk at pages 450-451.

The most productive way to address ownership would be to include these issues in the regulatory negotiation which we have recommended be pursued. The complete neglect of these issues in the review draft indicates to us that NPS lacks the capacity to address these issues without Indian involvement.

Interests as Governments

There are some aspects of this rule which can be seen as affecting Indian and Native governments as units of government. The ownership issue discussed earlier can be seen in this light, since the use of the ambiguous statutory language to decide whether certain materials are the property of an individual Indian or the national property of a tribe would, in essence, amount to a disregard for tribal lawmaking authority and the expressly stated federal government-to-government policy regarding Indian nations. In keeping with this policy, we recommend that the rules provide for the federal government to enter into formal agreements with Indian and Native governments regarding the recovery, return and treatment of cultural properties, as it has done with such countries as Peru.

Another way in which these rules will interface with tribal governmental authority arises from the exemption from the permit requirement found in section 4(g) of ARPA for any excavation from Indian lands by a tribe or by a tribal citizen if the tribe has a law regulating excavation and removal of archaeological resources. By enacting such a law, and by developing its own capabilities for conducting archaeological excavations, an Indian or Native government could render this rule inapplicable to most, if not all, of the excavations that will be conducted on lands under its jurisdiction. In conjunction with, or as an alternative to such a tribal legislative strategy, section 4(g)(2) of ARPA apparently gives Indian and Native governments a way to override the provisions of this rule with respect to "archaeological resources" which are excavated or removed from Indian lands. This section states: "The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe." Thus, if an Indian or Native government requests as a condition of issuing a permit that any human remains and grave goods shall be immediately given to the tribe for reburial, such a condition would seem to override any provisions of this rule with which it might be in conflict. This rule should make clear that Indian and Native governments have this authority.

It seems to us that a basic reason that the provisions of the review draft of this rule are so seriously flawed is that the NPS has not shown much initiative in helping Indian and Native governments become real partners in the federal historic preservation program. This is an issue which goes well beyond the scope of this proposed rule, and is perhaps best illustrated by the ongoing policy of not requesting appropriations for grants to tribes, which were authorized by the 1980 amendments to the NHPA. The relative lack of comments which NPS has received from Indian and Native governments regarding this review draft does not indicate a lack of concern but rather a lack of staff capacities. NPS should be taking some initiatives to help Indian and Native governments become informed about and participate in the federal historic preservation and archaeology programs.

SPECIFIC COMMENTS

Section 79.1 Purpose

Paragraph (a) - While there is a reference in paragraph (b) to the American Indian Religious Freedom Act, there is no mention of the First Amendment. As noted in our general comments, it is the First Amendment which establishes substantive rights, while AIRFA creates a procedural requirement intended to avoid unjustified burdens on the substantive rights created by the First Amendment. Paragraph (a), which recites the statutory authority, states the purpose of the rule only in terms of preserving material remains and associated records. This paragraph should also mention disposition, including repatriation of sacred material to Indians, which is required by AIRFA and the First Amendment.

Paragraph (b) - The references to Indian interests indicate only a limited awareness of Indian concerns with the subject matter of this rule. While there is a reference to materials recovered from Indian lands, the ambiguous, and in this context, confusing statutory language is used. See our earlier discussion and recommendation regarding this ambiguous language. The reference to Indians in this paragraph only mentions procedures for obtaining consent from Indian people or Indian tribes regarding the disposition of materials recovered from Indian lands. There is no mention of conditions that Indians can impose on the curation of cultural materials removed from Indian lands. Nor is there any mention of the repatriation to Indians of sacred cultural materials recovered from public lands, or from Indian lands. The "ultimate disposition" of materials is only mentioned in the last clause of paragraph (b), a clause which seems rather inconsistent with the first clause of the paragraph, which states that the rule will "enable Federal agencies to preserve" collections. There is a major need for revisions in this paragraph.

A revised paragraph (b) should make reference to provisions for agreements between the federal government and Indian governments regarding the recovery return and treatment of cultural properties. Regulatory language regarding such agreements should be included in a separate section of these rules, which would be most appropriately located following the definitions section.

Paragraph (d) - The guidelines in Appendix B must be withdrawn, for the reasons discussed above. A new policy should be developed and promulgated as part of this rule, following good faith negotiations with Indian and Native governments and religious leaders, preferably through regulatory negotiation. The new policy should be incorporated into this rule following the definitions section and before the section dealing with the "Capability requirements of repositories."

Section 79.2 Authority

Paragraph (b) - The last sentence should be revised to refer to the "Indian owner" as discussed earlier.

A new paragraph (c) should be added explicitly referring to the AIRFA and to the First Amendment, and stating that the statutory policies which this rule is meant to implement must sometimes yield to constitutionally protected interests.

Section 79.3 Applicability

Paragraphs (b)(1) and (b)(3) - We do not agree that all materials removed from public and private lands are the property of the United States or the person holding title to the land. Where the materials consist of human remains and associated grave offerings, the descendants of the persons interred should control what happens to them. Even in the case of other materials, the situation is not always so simple. Indian people were forced to move off of much land that is now public or privately owned by non-Indians. Materials removed from such lands, in essence, may have been stolen from the original owners.

Paragraph (b)(2) - See our earlier comments concerning ownership. In addition, since it is inappropriate to separate a collection of archeological resources from the records which accompany it, these records should remain with the collection as the property of the Indian owner. The extent to which the United States is entitled to a copy of the records should be determined by agreement between the owner and the

United States. In the case of human remains or sacred objects, the Indian owner may have legitimate reasons for restricting access to or retaining exclusive control over such records.

Section 79.4 Definitions

This section should include a definition of "Indian owner" which provides for resolution of the problems regarding materials found on land owned by an Indian individual but which are collectively owned by the Tribe. This definition should be developed as a part of the regulatory negotiation process suggested above. In general ownership should be determined according to the laws and customs of the Indian people involved.

Paragraph (a)(1)(vi) - We believe that it is not appropriate to define "human remains" as a subcategory of "collections." Human remains are not just one more kind of archeological resource, and to define them in this way sets the stage for insensitive and inappropriate treatment. See NCAI Resolution 43-86-57. Grave goods should be defined separately from other artifacts.

Paragraph (a)(2) - A new paragraph (iv) should be added here to read:

> (iv) Documentation of oral history and oral tradition, including but not limited to video and audio cassette tapes, films and manuscripts.

Section 79.5 Capability requirements of repositories

Paragraph (a)(1) - As discussed elsewhere, curation is not appropriate for certain materials which are presently federally owned or administered. The requirements of section 79.5 should only apply to materials for which it has been determined that curation is the most appropriate treatment.

Paragraphs (a)(6), (a)(7), and 79.5(b) - See earlier comments concerning ownership.

A new paragraph (c) should be added to read as follows:

> (c) The repository must certify that its treatment of materials with religious significance will not place a burden on religious beliefs and practices.

Section 79.6 Use of collections.

Paragraph (a) - The present wording of this sentence is too restrictive. Sacred objects should be available for any appropriate use, not merely for short-term loan. A preferable wording might be:

> (a) Sacred objects in collections must be freely available to practitioners of Native American religions for use in traditional rites and ceremonies.

Paragraph (b) - Sacred objects should not necessarily be available for study and loan to researchers. Such uses must give way to First Amendment concerns when there is a conflict, and must not be allowed where they would place a burden on religious beliefs or practices. In addition, there must be a requirement that consent of the Indian owner be obtained prior to any transfer of collections, including any loans.

Paragraph (c) - Reword as follows:

> (c) Federally administered collections which were recovered from Indian lands shall be returned to the Indian owner upon request and shall be available to the owner at any time without restriction.

Paragraph (d) - See earlier comments regarding ownership. Substitute "Indian owner."

Paragraph (d)(3) - This paragraph leaves too much to the discretion of the federal agency official. If the agency is considering the display of human remains and religious objects, it should be required to obtain consent from the Indian owners as well as with appropriate tribal religious authorities. In the absence of such consent display of human remains and sacred objects should be prohibited.

Paragraph (d)(4) - Same as (d)(3).

Paragraph (d)(5) - These guidelines must be withdrawn, as discussed earlier in these comments.

Paragraph (d)(6) - This paragraph seems to ignore the looting problem that exists on Indian lands and public lands. We believe that the problem is so severe that a rebuttable presumption should be employed that the restriction of access to locational information is warranted. Thus we recommend changing the word "may" in the second sentence to "shall."

Paragraph (e)(1) - The use of materials for religious purposes should be addressed separately from the use of materials for educational or scholarly purposes. Where the use for educational or scholarly purposes would impose burdens on religious beliefs and practices, the process used to attempt to accomodate the competing interests must recognize the constitutional nature of the religious interests, and, if the interests cannot be reconciled, the educational or scholarly use must yield to the religious use. In addition, we object to the use of the term "loan" to describe access to materials to which Indians assert ownership.

Paragraph (e)(3) - The ownership issue arises again in this provision. See our earlier comments.

Section 79.7 Administration of collections from Indian lands.

The lack of resolution of ownership issues creates problems that are reflected in this section. Proceeding to the notice of proposed rulemaking for this section shoul be delayed until after regulatory negotiation.

Paragraph (a)(1)(ii) - Procedures for religious use should be treated separately from procedures for educational and scholarly use.

Paragraph (b) - Native American groups which are not federally recognized Indian tribes may nevertheless have ownership interests to materials taken from lands which were not voluntarily abandoned. Communication between the federal agency official and such groups should not be discretionary. If the federal agency official becomes aware of the existence of such a group, communication should be required.

Section 79.8 Exchange and ultimate disposition of collections.

This section combines subjects which should be addressed separately, in three separate sections. First, there should be a section on repatriation of cultural materials to Indian and Native people, which, as we have said, should appear at an early point in this rule, preferably following the definitions section and which should replace the existing "policy" on the disposition of human remains. This new section should provide for agreements between the federal government and Indian governments regarding the recovery, return and treatment of cultural properties. The subsequent sections on exchange and ultimate disposition should apply only to materials for which curation was determined to be the appropriate treatment.

Paragraph (b) - This paragraph should mention the option of repatriation of cultural materials to the appropriate Indian or Native government, and refer to the process established elsewhere in the rule for carrying out such repatriation.

Paragraph (c)(5) - The ownership problem again

Paragraph (c)(6) - "All other legal requirements and applicable agency regulations must yield if compliance would result in a burden on religious beliefs and practices

Paragraph (c)(7) - We object to the term "donate" and to the discretion allowed by the review draft. We suggest that this paragraph, which should be moved to the section dealing with repatriation, state that the federal agency official "shall repatriate" a sacred object in its collection to the appropriate Indian tribe upon making certain determinations. Subparagraph (ii) should be revised by inserting, after the word "ceremionies" the words "or other religious purposes." Subparagraph (iii) is yet one more example of the ownership issue. Subparagraph (iv) should be deleted. If all "other legal requirements and applicable agency regulations" cannot be met without placing a burden on religiou beliefs and practices, then statutory and regulatory requirements may have to yield to protect constitutional rights.

Paragraph (d) - There must be a procedural requirement to insure that such an exchange would not yield an infringement of religious freedom.

Paragraph (e) - If the material has cultural or religious significance to Indians or Natives, repatriation should occur rather than discard.

Paragraph (e)(2)(iii) - The ownership issue arises again.

Section 79.9 Periodic Inspections

Paragraph (b) - The last sentence of this paragraph should state that inspections and inventories should be done "in accordance with the conditions requested by the Indian tribe or other group for which the materials have religious significance."

Section 79.11 Suspension and termination of contracts, etc.

If the materials are owned by an Indian tribe or Indian or Native individual, or if the materials are sacred, must be notified in the event of contract termination or suspension.

Resolution 43-86-51

RESOLUTION CONDEMNING INTERIOR'S POLICY ON HUMAN REMAINS AND OTHER SACRED MATERIALS WHICH WAS DEVELOPED WITHOUT TRIBAL CONSULTATION

Whereas, Indian and Native governments and people gathered in Phoenix, Arizona, for the 43rd Annual Convention of the National Congress of American Indians, in order to promote the common interests and welfare of American Indian and Alaska Native peoples; and,

Whereas, in 1982, the Department of the Interior developed and adopted a policy for the disposition of human remains, which policy was developed without consultation with Indian and Native governmental and religious leaders and without publication in the Federal Register for public comment; and,

Whereas, section 5 of the Archeologial Resource Protection Act of 1979 authorizes the Secretary of the Interior to promolagate regulations governing the subject matter, but the publication of Notice if Intent to propose rules pursuant to this section (50 Federal Register 41527; Oct. 11, 1985) does not discuss reburial and repatriation as issues that will be addressed through the planned rulemaking as unappendix to the planned rules; and,

Whereas, the process used in developing the Interior's Departments Policy on the disposition of human remains did not comply with the Administrative Procedure Act; and,

Whereas, a lack of sensitivity to Indian and Native American religious interests is contrary to the policy established by the American Indian Religious Freedom Act of 1978, 42 VSC 1996; and,

Whereas, language in the policy on the disposition of human remains states, that religious concerns are to be addressed as long as statutory responsibilities regarding archeological resources can be fulfilled thereby subordinating Indian cultural and religious interests to the perceived scientifica value of human remains; and,

Whereas, as a result of this policy the historic and pre-historic remains of Native American people continue to be curated in federal institutions for ultimate scientific study rather than appropriate reburial consistent with the desires of desendent tribe group.

Resolution 43-86-51

Now, therefore, be it resolved that the National Congress of American Indians condemns the on going use and implementation of the Interior Departments policy on the disposition of human remains, unless the policy is expeditously withdrawn by the Department and consultation begun involving tribal governmental, religious and cultural leaders with particular attention to the religious and cultural rights of Native people, NCAI hereby recommends that litigation be initiated against the Interior Department to invalidate the policy.

Adopted by the 43rd Annual National Congress of American Indians Convention, September 26, 1986. Phoenix, Arizona.

Resolution-43-86-57

RESOLUTION REJECTING THE FEDERAL LAWS WHICH DEFINE INDIAN AND NATIVE BURIAL SITES, HUMAN REMAINS AND GRAVE GOODS AS "ARCHAEOLOGICAL RESOURCES"

Whereas, Indian and Native governments and people gathered in Phoenix, Arizona, for the 43rd Annual Convention of the National Congress of American Indians, in order to promote the common interests and welfare of American Indian and Alaska Native peoples; and,

Whereas, for well over a century the prehistoric and historic remains and grave goods of Indian Native people have been removed from federal and state lands and from private lands and Indian lands, and these human remains and grave goods have been curated and stored in federal institutions such as the Smithsonian Institution and other federal and state museums, universities and other institutions; and,

Whereas, this insensitive treatment of Native remains and associated grave goods has been facilitated and encouraged by the antiquities laws and policies of the federal government. While facially intended to prevent the wanton looting of Indian and Native graves and other cultural sites, these laws actually condone and permit these same activities by the physical anthropological and archaeological community in the United States, by defining these sites as "archaeological resources" and by allowing materials to be disturbed and removed therefrom and to be stored in museums and other institutions. These laws have trampled on the religious and cultural rights and group rights of Indian and Native people; and,

Whereas, as a direct result of federal antiquities laws and policies, today the remains of more than one-half million Native people and associated sacred grave materials remain curated, stored or on public display in museums, universities, and other institutions in the United States, and,

Whereas, the federal antiquities laws and policies do not give appropriate recognition to the significance that historic and sacred properties hold for Indian and Native people living today; rather, these laws seem to subordinate the traditional religious beliefs and practices of today's Indian and Native people to the scientific study of the past and the burdens on religious practices that result from this subordination of interests constitute violations of the First Amendment to the Constitution of the United States; and,

Whereas, traditional Indian and Native people believe that continuing to allow this manner of disrespectful treatment of human remains and associated sacred grave materials destroys the spiritual balance of life and the spiritual balance of nature. It is the belief of Native people that this disrespect violates the spiritual laws of nature and the Creator and that if this disrespect continues all humankind and all living things will suffer.

Now, therefore, be it resolved that the National Congress of American Indians rejects the federal laws which define Indian and Native burial sites, human remains and grave goods as "archaeological resources" and which permit the continued curation, storage and display of these sacred materials in museums, universities and other institutions. Federal laws must be changed to reflect Indian and Native religious and cultural rights to determine the treatment and disposition of these materials.

Adopted by the 43rd Annual National Congress of American Indians Convention, September 26, 1986, Phoenix, Arizona.

Prepared Statement Of Steven C. Moore, Walter R. Echo-Hawk, Henry Sockbeson, Of The Native American Rights Fund

On behalf of the Tunica Biloxi Tribe of Louisiana and numerous other tribal and Alaskan village clients the Native American Rights Fund hereby submits for the record the following comments on S. 187, the "Native American Cultural Preservation Act" of 1987. As we indicated in our 18 December 1986 letter to you on this subject, we appreciate your interest in the federal curation of Indian skeletal remains and associated grave goods, and your commitment to the expeditious return of these remains to Indian people for appropriate disposition consistent with traditional beliefs. The disparate treatment of these materials by the United States is one of the major festering sores in the federal government's legacy of cultural and religious persecution of Indian people. The time has come literally to get these skeletons out of the closet and return them to their intended resting places.

We have several comments of both a general and specific nature which we would like to offer for your consideration at this time. First, while we applaud the underlying purposes of the legislation, and its effort to work an equitable compromise between diverse, competing views, we believe the legislation ignores a fundamental legal precept which cannot be overlooked. More precisely, we firmly believe that where cultural affinity can be demonstrated, a tribe or tribal group has property rights in human remains and associated grave goods superior in the law to the asserted property rights of either the federal government or public or private institutions which house collections removed from public or private land. Unfortunately, the legislation as written perpetuates the mistaken presumption of federal ownership of these materials. We assert this superior property right and interest notwithstanding the claim made by the federal government that gravesites discovered on public lands are the property of the United States.[1]

In this vein we refer you to two attached documents: the first is the recent opinion of the Court of Appeals for the State of Louisiana in Leonard Charrier v. Louise Lessley Bell, et al., No. CA-85-0867 (October 15, 1986); and the second is a copy of a law review article by Walter R. Echo-Hawk, entitled Museum Rights Versus Indian Rights; Guidelines For Assessing Competing Legal Interests In Native Cultural Resource, Vol. XIV N.Y.U.Rev. of Law and Social Change 473 (1986). The basic premise of our argument is that the federal government cannot establish good, clear title to the skeletal remains and associated grave goods unless it can be established factually that either title was acquired from the respective Indian tribes or that those tribes intended to abandon legal title and claim to such property. The same argument holds with respect to private institutions and the skeletal and grave goods contained in those collections, whether obtained from private or public sources.

In short, we believe any federal legislation dealing with this issue should start with the presumption that, absent clear and convincing rebuttal evidence, Indian tribes with cultural affinity hold legal title to human skeletal remains and grave goods contained in the museum collections which are the subject of your proposed legislation.

The foregoing statement of our position obviously raises the question of whether we can support the proposed legislation and remain consistent with our view. To remain consistent with our position we would have to see substantial amendments made to Section 5 of the proposed bill. Such amendments would, for all practical purposes, eliminate (with the exception of the proposed Section 7 amending Section 4 of ARPA) the necessity of creating a Museum Advisory Board. There would be no circumstances in which there would be a dispute between the involved museum or other institution and involved Indian tribe or tribes concerning the disposition of the human remains which are the subject of the tribe's interest. This is because, as stated earlier, tribes have superior property rights to human remains and associated grave goods; hence, there would be no question as to whether they would be returned to the tribe for the proper disposition. Circumstances will obviously vary from tribe to tribe; an Indian tribe might perhaps be willing to allow some scientific study or examination of the involved skeletal remains. Under those circumstances, the Advisory Board staff could assist in preparing the appropriate agreements between the institution and tribe concerning the methods of scientific examination allowed, periods of time in which the examinations would have to occur, and other related details.

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[1] See, e.g., definition of graves and human skeletal remains as "archeological resources" in the Archeological Resources Protection Act of 1979, 16 U.S.C. §470aa.

Before moving on to specific comments relating to the bill as drafted, it is important to point out that we wholly endorse and support the proposed Section 7 of the legislation, amending the Archeological Resource Protection Act of 1979. We would point out, however, that the definition of "archeological resource" should be amended to strike the reference to or classification of graves and human skeletal materials discovered on public lands. In short, we support the concept of federal protection of grave sites and human skeletal remains of the aboriginal inhabitants of the continental United States, Alaska and Hawaii; however we believe the authority of the United States to preserve and protect such resources stems from the federal trust responsibility owed to Native peoples in this country, and not by virtue of any property rights which the United States has acquired in the graves and human skeletal remains of Native people.

Notwithstanding the fact that we do not wholly support or endorse the bill as presently drafted, we offer the following concerns and comments. We would like to point out initially that for some of our concerns we cannot provide recommendations or answers to at this time; however, we merely flag these issues for our future collective consideration.

Section 2 - Findings.

This section outlines the basic problem that the bill is intended to address, i.e. the need of tribes to secure the skeletal remains and sacred objects that are in the possession of museums. The bill recognizes that tribes have a moral right to these items but the bill goes on to recognize that the academic interest of the museums must be balanced against the tribal interest. Why this balancing test must be applied in all instances, or why it must be applied at all, the bill does not state.

Section 3 - Definitions.

a. The definition of "Indian" is unduly restrictive. Of immediate concern is the protection of the rights, or example, of Native Alaskans who, by virtue of their birthdate, are not considered shareholders in the Alaska regional corporations. Similarly, what are the rights of descendants of enrolled members of Indian tribes even though not enrolled?

b. The definition of "Indian tribes" is also unduly restrictive. What of tribes which have a distinct cultural, geographical and political organization yet are not federal recognized? Because we are talking here about their First Amendment constitutional and property rights, any federal legislation in the area must necessarily include the rights of unrecognized tribes to protect the graves and human skeletal remains of their ancestors.

c. In defining the term "Native Hawaiian organization" we would hesitate to give the Governor of the State of Hawaii the authority to select the organization. It does place an unnecessarily subjective, political restriction on the rights of Native Hawaiians to protect these resources. We recommend you contact Mahealani Ing, Director, Native Hawaiian Legal Corporation at (808) 521-2302 for further consultation.

d. The last phrase of the definition of "traditional cultural authority" should be changed to read the "traditional cultural affairs of Indian people", rather than "the traditional affairs of the Indian."

Section 4 - Native American Museum Advisory Board.

This section creates a Board which will be the administrative agency to deal with the substantive problem described in the findings. The bill states that the Board will have 17 members but this is, as will be seen, incorrect. Only six seats on the Board must be allocated to Native American interests. The members are appointed by the President from a list supplied by Indian tribes. Exactly how tribes will develop the list is not specified. One Board seat is allocated to a Native Hawaiian. This individual is appointed by the President based upon a list supplied by the Governor of Hawaii.[2] All of these seven appointments are made voting members of the Board.

Two members from both the House and the Senate are also to be appointed (but how they are selected is not mentioned). These four slots are also voting members. We fail to see the utility or necessity of having these Board members.

Two members, appointed by the President, are to represent archeology and anthropology interests but there is no provision indicating how the President is to select them. These are voting members. Two members, again appointed by the President in an unspecified manner, are to represent museum and university interests. These are also voting members. This brings the total of voting members to fifteen with six representing Native American and one representing Native Hawaiian interests.

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[2] *See* earlier comment.

The remaining members of the Board are non-voting seats. One seat each is allotted to the Institute for American Indian Arts, the Smithsonian Institution, Secretary of the Interior, Secretary of the Agriculture and the Executive Director of the Advisory Council on Historic Preservation. These five non-voting seats can attend all meetings and provide "advice."

To summarize, of the 15 voting seats, only 7 represent Indian interests. The remaining voting seats (which constitutes the majority) represent scientific, political or university/museum interests. If you factor in the non-voting seats the tribal interests have 7 of 20 seats.

Is the board free-standing or is it to be housed within the Department of the Interior? What is its legal status as a "Board"? In terms of the federal appropriations process, how will the Board be characterized for purposes of determining which House and Senate committees would have jurisdiction over appropriations as well as oversight to its operations?

The rest of section three is devoted primarily to Board housekeeping matters (rate of pay, election of chairman, etc.). Three items are of interest. First, a quorum consists of half of all voting members so a meeting could be held without any Indian participation. Second, vacancies can apparently be filled by the Board, so Indian replacements would not be controlled by Indian interests nor would the vacancy have to be filled from the list of nominees supplied by the tribal groups. Lastly, Native Americans are extended a preference in hiring for all staff positions but it is not clear if the Executive Director or the General Counsel would be covered by the employment preference.

Section 5 - Dispute Resolution.

This section describes what the Board is supposed to do once it begins functioning. The bill anticipates that when a dispute arises between a museum and an Indian tribe over possession of Indian artifacts or skeletal remains which is in the possession of non-Indian interests, the Board is authorized to "mediate" the dispute. Certain procedural requirements must first be met to establish that a dispute exists (primary time and notice requirements). The Board initiates an investigation but is not bound to conclude it within any particular time restraints.

If, after investigation, the Board reaches a "negative" finding the Board must dismiss the petition. Problems arise at this point. There is no apparent appeal process. It is not clear that this negative finding constitutes "agency action" which would serve to trigger the Administrative Procedure Act and thus allow appeal to federal courts. In addition, there is no requirement that a museum or university (or tribe for that matter) that has a seat on the board must refrain from decision making if it represents the entity being complained of; i.e., there is no conflict of interest provision.

If a tribe's complaint is found to have merit the Board is supposed to devise a "compromise settlement." This settlement is supposed to accommodate the interest the tribe has in return of the object and the interests of others who seek possession of the items for display, research or study purposes. The accommodation must, under the proposed bill, balance the competing interests. The bill again runs into problems at this point because, in many instances, the tribe should have an absolute right to return without any strings being attached. If a tribe, for example, has an item stolen from it by grave robbers and then the item is "sold" to a university, why should the tribe's interest be balanced against the university's at all? If a car is stolen and is illegally sold to another, the buyer of the "hot" car has no ownership interest. If recovered, the original owner gets the car back. The bill, however, fails to recognize this common occurrence.

The proposed bill also provides that where the Board rules that the skeletal remains or artifact should be returned to the tribe there must be a provision which requires "to the maximum extent possible" that the museum have access to the artifact for research, etc. provided that the tribe approves and any information is shared with the tribe. An obvious problem with this approach is that no real solution is being offered. The provision requires museum access to the maximum extent but often this is inconsistent with tribal needs. One does not permit strangers to carbon date or otherwise interfere with the remains of tribal ancestors. If a tribal object is central to a religious ceremony then viewing, picture-taking or other handling by non-members is prohibited. The mandatory language requiring museum access to the "maximum extent possible" imposes a burden that often cannot be met.

One could easily conclude that the provision requiring tribal consent would seem to solve this problem. All a tribe has to do is refuse access. The problem is that Section 5 of the proposed legislation further provides that if the Board finds that the Indian tribe has not conformed with the Board imposed agreement then, upon publication and finding, the tribe becomes ineligible to receive federal funding for a two year period.

If a tribe, therefore, decides to refuse museum access the Board (which is dominated by non-Indian interests) has the power to make a finding and publish a notice of non-compliance which results in a tribe's becoming ineligible for any federal funds for a two year period. This finding is explicitly made non-reviewable by a federal court.

A major problem with the bill is that the jurisdiction of the Board is not clearly stated. The bill speaks only in terms of actions against museums but many artifacts are held by universities and private collectors. The bill provides for cataloging of federal holdings but does not make clear whether the United States is bound by the bill. Is, for example, the Smithsonian obliged to return all of its skeletal remains upon demand by a tribe? The bill needs to be clarified on the jurisdictional level.

Obviously, there are significant problems with this section. The ambiguous language, lack of due process and apparent inability of the Board to develop a range of punishment are all failings that must be cured. There are additional problems but these are the most difficult and obvious.

Section 6 - Native American Center.

This section establishes a "Center" within the Library of Congress. The Center is charged with the responsibility of listing all the skeletal remains and artifacts in the possession of the federal government. The compilation of this information will be distributed or sold to tribes or other interested parties.

An obvious problem with the section is that it does not require that the information be compiled on a tribe by tribe basis or that tribes be notified of the findings. Nor does it make clear that the items are subject to the petition for return process. The obligation to return material must be clarified and the compilation must be done on a tribe by tribe basis or it will be difficult for a tribe to determine exactly what material is held by the federal government or which agency holds it.

The Center has certain duties laid out which include the furnishing of advice as to the establishment of model (tribal?) museums, historic preservation and the promotion of cooperation between tribes and museums both inside the United States and with foreign museums. Staffing is provided for with a preference being extended to Native Americans. Again, it is not clear that the Executive Director's appointment is subject to the Indian preference.

Section 7 - Amendments to the Archeological Resources Protection Act.

The first proposed amendment is apparently intended to include Native Hawaiian lands within the definition of Indian lands. If so, the effort fails. Rather than modifying the term "Indian lands," as was apparently intended, the proposed amendment would modify an exception to the Indian lands definition that was created for certain subsurface interests. The amendment should appear after "Indian individuals." In any event, the Indian lands definition contained in this section is much too constrictive. It apparently excludes on-reservation patented lands. At the very least, the Indian lands definition should be as broad as the Indian country definition that is provided in 18 U.S.C. 1151(a) (" . . . all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.").

If Native Hawaiians are to be included then they should be added to the "Indian tribe" definition provided in 470bb(5).

The term "sacred artifact" is defined so as to exclude items formerly used in religious or cultural activity. Apparently only currently used sacred objects are intended to be covered.

With respect to newly discovered skeletal remains the proposed amendments would require that the Federal land manager "consult" with the relevant tribe and archeological and physical anthropological authorities. If the consultation fails, the matter is referred to the Board. The problem with this section is that there are no time deadlines imposed on the land manager nor is there a clear direction as to which tribal entity has standing to claim a right of disposition. The bill speaks in terms of tribes having "cultural affiliations" with the remains. This would not provide much guidance to a land manager who has no training or expertise in the matter. It may be preferable for the Board to be directed to develop regulations to cover these sorts of determinations.

Thank you for your attention to these comments.

Very truly yours,

Steven C. Moore

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Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources

Walter R. Echo-Hawk

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MUSEUM RIGHTS VS. INDIAN RIGHTS: GUIDELINES FOR ASSESSING COMPETING LEGAL INTERESTS IN NATIVE CULTURAL RESOURCES

WALTER R. ECHO-HAWK*

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INTRODUCTION

The manner in which state and federal museums acquire and display collections for public viewing reflects American law and social policy relating to cultural resources and historic preservation. Since their inception museums in the United States have had a relationship with Native Americans that has been both beneficial and antagonistic.[1] This paper examines the legal history of that relationship. The issue presented is whether museums can effectively convey to the public a portrait of Native Americans that does not violate or offend their religious beliefs or cultural integrity. The principal focus of this article is on property rights, as other literature extensively examines applicable free exercise of religion issues.[2]

As is true of other distinct cultural groups which make up the social fabric of the United States, Native Americans are the exclusive owners of unique traditions and values. The first amendment of the United States Constitution accords Native Americans the right to enjoy their uniqueness and to be secure in their right to be Indian. The overriding national interest in protecting this fundamental liberty was aptly described in a case which upheld the first amendment right of Navajo Indians to use peyote, a stimulant drug, in religious ceremonies of the Native American Church:

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[1] *See, e.g.*, Lurie, *American Indians and Museums: A Love-Hate Relationship*, in 2 THE OLD NORTHWEST 235 (1976).

[2] *See infra* note 8.

> [T]he right to free religious expression embodies a precious heritage of our history. In mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an older religion in using peyote one night at a meeting in a desert hogan near Needles, California.[3]

Unfortunately, recognition of the fundamental liberties of Native Americans has not always characterized the historical relationship between the United States and Indian Tribes.[4] Active suppression of Indian religion and culture is well-documented and has only recently been acknowledged by the federal government.[5] Museums played a vital role in the preservation of Native American culture during crisis periods in which the federal government actively sought to assimilate the Indian into the mainstream of American society.

> Instances occurred throughout the country in which owners or custodians of such materials [sacred objects] turned them over to museums and provided the collector with the accompanying history, legends, songs, and ceremonies because there were no interested successors to receive them and continue traditional knowledge. Museums were seen as places of safe-keeping in the face of zealous missionaries, abetted by the Indian Bureau, who confiscated and destroyed symbols of Indian "heathenism." The in-roads of Christianity prompted some converts to destroy their sacred paraphernalia unless a museum curator managed to intervene in time with an offer to purchase medicine bags, drums or whatever.[6]

Today, these collections provide a means for all Americans to better understand, appreciate, and respect past and present day American Indians. As pointed out by several commentators, the unique perspectives of Native culture, based in large part on the North American environment, have much to offer to the dominant society which, due to increasing awareness of environmental problems, is now in the process of rethinking its relationship to the environment.[7] Museums have played, and can continue to play a role as a bridge between cultures.

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[3] People v. Woody, 61 Cal. 2d 716, 727-728, 394 P.2d 813, 821-822, 40 Cal. Rptr. 69, 77-78 (1964).

[4] *See generally* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1 (1982).

[5] *See* FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (Aug. 1979) [hereinafter cited as AIRFA Report].

[6] Lurie, *supra* note 1, at 239. Of course, sacred objects also left Indian hands in other ways. Some were stolen, others sold by Indians who did not have title; some were taken by the government as spoils of war, others illegally expropriated by non-Indians from federal lands. *See* AIRFA Report, *supra* note 5, at 77-78.

I

MUSEUM MISUSE OF NATIVE AMERICAN ARTIFACTS

The relationship between museums and Indians has not always lived up to its fullest potential. Recent literature has documented numerous existing problems in various parts of the country.[8] Most significant are the findings contained in a report submitted to Congress in 1979, pursuant to Section Two of the American Indian Religious Freedom Act of 1978 (AIRFA).[9] Section One of the Act provides:

> On or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, *use and possession of sacred objects*, and the freedom to worship through ceremonials and traditional rites.[10]

To carry out that policy, Section Two of AIRFA directed the President to evaluate all federal policies and procedures in consultation with native traditional religious leaders in order to determine how best to preserve Native American religious cultural practices.[11] The President was also directed to report the results of his evaluation to Congress, including any changes which were made in administrative policies and procedures, and any recommendations for legislative action.[12] While few, if any, of the AIRFA Report recommendations have been implemented,[13] the findings and recommendations of that Report cast a useful perspective on the scope and nature of the problems that this paper addresses.

The appendices of the AIRFA Report contain examples of specific problems regarding the handling by museums of Native artifacts. They include museum display of skeletons, improper display or handling of sacred artifacts, possession of stolen items, and requests for the return of ceremonial objects. The Report analyzed these problems and developed administrative recommendations that could be implemented by the federal museums under existing statutory authority.[14] These recommendations have potential nationwide application for federal museums; they can also serve as standards for non-federal museums. The recommendations direct that:

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[7] *See, e.g.*, Suagee, *supra* note 4.

[8] *See, e.g.*, Blair, *American Indians v. American Museums, A Matter of Religious Freedom*, 5 AM. INDIAN J. 5-6 (1979); Davies, *Indian Religious Artifacts: The Curator's Moral Dilemma*, 2 INDIAN L. SUPPORT CENTER REP. 1 (1980); Note, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979).

[9] Partially codified at 42 U.S.C. § 1996 (1981).

[10] *Id.* (emphasis added).

[11] *Id.* (historical note).

[12] *Id.*

[13] *See* Suagee, *supra* note 4, at 2 n.6.

> a. Federal museums should decline to acquire for their collections objects known to be of current religious significance to American Indian, Aleut, Eskimo or Native Hawaiian traditional religions, and should inform such Native American tribal and religious leaders of the presence on the market or in non-Native hands of such objects as come to their attention.
>
> b. Federal museums should return to the tribe of origin objects in the museum's possession, as to which unconsenting third parties assert no ownership interest, that were used or valued for religious purposes at the time of their loss from an American Indian tribe or Native American community, and were alienated from that community contrary to standards for disposition of such objects then prevailing in that community, provided that the successor or modern tribe or community requests them as needed for current religious practice.
>
> c. Federal museums should consult traditional Native religious leaders for guidance as to the museums' practices regarding exhibition and labeling, conservation, and storage of Indian, Eskimo, Aleut and Hawaiian sacred objects in their possession.
>
> d. Federal museums should facilitate periodic ritual treatment by appropriate religious practitioners of sacred objects in their possession, at the request of such practitioners.[15]

These recommendations are consistent with the law discussed in the following sections of this article.

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[14] *See* AIRFA Report, *supra* note 5, at 76-81. The Report was primarily concerned with federal museums, such as the Smithsonian Institution, which are administered by various federal agencies, as opposed to state, local, or privately operated museums. Interestingly, the Smithsonian Institution which, according to some estimates, possesses the skeletal remains of at least 14,000 Indians, see Letter from Acting Director of the Smithsonian's National Museum of Natural History to National Congress of American Indians (Aug. 29, 1985), refused to participate in the AIRFA Federal Agencies Task Force or adopt its recommendations. AIRFA Report, *supra* note 5, at 19-25. The Smithsonian claimed that because it was created by Congress, it was not one of the "federal departments, agencies and other instrumentalities" subject to Section 2 of the AIRFA. The failure of the Smithsonian to review its policies is disturbing not only because of its extensive Native holdings, but also because it controls the actions of many other museums under the Antiquities Act of 1907, 16 U.S.C. § 431 (1971), and various regulations promulgated thereunder, such as 43 C.F.R. § 3.8. (1985) *See* Blair, *supra* note 8, at 21. Hence, the extent to which the Smithsonian will abide by the AIRFA recommendations is unresolved.

[15] AIRFA Report, *supra* note 5, at 81.

II

THE DEVELOPMENT OF THE LAW AS IT RELATES TO INDIANS AND MUSEUMS

Each problem identified in the AIRFA Report raises a unique set of rights, responsibilities, and liabilities. Since these legal relationships are still evolving, it is useful to review the history of their development in order to evaluate the rights that are at stake. This section attempts to provide the background information necessary for museums and Indians to assess their legal interests in ownership disputes over Native cultural property.

A. Acquisition of Objects that were Sold by Individual Indians

Museum accession records show that some Native cultural property was sold by its original owners. Typically, these objects were passed through the possession of a number of buyers prior to being acquired by museums. Museums claim title to the cultural property by virtue of purchase or gift. Nonetheless, it is improper for museums to reject Indian claims on that basis alone, particularly where Indian tribes seek to reclaim artifacts alleged to be communal tribal property.

In resolving property disputes of this nature it is important to be mindful of the following provision of the United States Code:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possesion or ownership.[16]

Indian tribes, as well as individuals, benefit from this statute in suits against non-Indian individuals, corporations, partnerships, or societies.[17] Museums must, therefore, carry the burden of producing evidence to sustain their ownership claims. Specifically, they must prove that the Indians who originally sold the object had valid title. American property law provides that a purchaser of property acquires no title if the seller has none to convey.[18] For example, in *Seneca Nation of Indians v. Hammond*,[19] the New York Supreme Court held that defendant non-Indian purchasers of a quantity of hemlock bark bought from individual Indians acquired no title, because the property belonged to the Seneca Nation as a whole. The Court stated:

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[16] 25 U.S.C.A. § 194 (West 1983).

[17] *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979). However, the statute does not generally apply to disputes involving states. *Id.* at 667-68.

[18] The general rule was stated in 1850 by the New York Court of Appeals in Silsbury v. McCoon, 3 N.Y. 379, 381-84 (1850):

> It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking . . . . And, if the wrongdoer sells the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser has none to give.

[19] 3 Thompson & Cook 347 (N.Y. 1874).

> The bark in question . . . was the property of the plaintiffs. Those who purchased it from individual Indians got no title, and they could confer none on the defendants. Everybody who meddled with the bark became a trespasser. It is no defense that the defendants acted for others in buying the bark, or that they purchased it without notice that their vendors had no title; or that their acts, of which the plaintiffs complain, were done in good faith.[20]

In the area of federal Indian law, the courts have long distinguished individual from communal Indian property. Individual tribal members have no title to communally owned property held for the common use by the tribe.[21] Museums should be aware of that property distinction, as explained in *Journeycake v. Cherokee Nation*:[22]

> The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the lands as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.[23]

Moreover, while it is no defense that a museum purchased an object in good faith without knowledge that a seller did not possess title, the museum does have a remedy against the seller to recover the purchase price under the theory of breach of implied warranty of title.[24]

The above rules have particular application to property disputes between museums and Indians. For example, *Onondaga Nation v. Thatcher*[25] involved a dispute between the Onondaga Nation and a non-Indian who had purchased wampum belts from an individual Onondaga Indian. The Tribe claimed that the wampum belts were important communal property of the Six Nations

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[20] *Id.* at 349.

[21] *See* United States v. Jim, 409 U.S. 80, 82 (1972) (no individual title to unallotted tribal lands); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1292 (7th Cir. 1974) (treaty hunting and fishing rights belong to the Tribe as a whole and not to any one indiviudal); Whitefoot v. United States, 243 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (no individual property rights in tribal fishing place); United States v. Felter, 546 F. Supp. 1002, 1021 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985) (tribal rights in property are owned by the tribal entity, and not as a tenancy in common of the individual members).

[22] 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894).

[23] *Id.* at 302.

[24] *See, e.g.*, Menzel v. List, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

[25] 29 Misc. 428, 61 N.Y.S. 1027 (Sup. Ct. Onondaga Cty. 1899).

Confederacy, and that the sale was unauthorized.[26] The court found, however, that the Six Nations Confederacy had ceased to exist by 1891, the date of the sale, and that the wampum belts were relics owned by the individual Indian seller.[27] Nonetheless, if the Tribe had proved its claims in *Onondaga Nation*, a different holding may have been reached. More recent cases provide guidelines for evaluating Indian property claims.

The property rights of Indians who reside in Indian Country are governed by the laws and customs of the Tribe.[28] Hence, museums look to tribal law and custom to determine whether an Indian seller conveys good title. Ethnologists can often provide assistance in these inquiries.[29]

In other cases, either direct reference to tribal law is required or a tribal court must resolve the dispute. For example, in *Johnson v. Chilkat Indian Village*,[30] a suit was brought by a Tlingit Indian against the Tlingit Tribal Village Council to determine the title to tribal artifacts that were over one hundred years old that were significant to the culture and heritage of the tribe. The plaintiff claimed ownership to the artifacts under Tlingit tribal law and custom, and had contracted to sell them to art dealers in the State of Washington. The Village Council disputed that claim, asserting that ceremonial objects are held in common by all members under Tlingit tribal law and custom. When the Council passed an ordinance prohibiting removal of the artifacts, the member sued the Council and other individuals who sought to prevent her from removing the artifacts. The federal court dismissed all claims against the Council on sovereign immunity grounds. It also dismissed the claims against the individuals, stating:

> The "property" interests of the villagers and the efforts of the Village government to preserve its heritage are so entwined that any decision by this court as to the interest of the plaintiff would prejudice the Chilkat Indian Village Council . . . . This Court sees no reason to regard potential damage to a Village's heritage and culture as less important than a Tribe's interest in developing a coal mine or a residential subdivision."[31]

The federal court referred the dispute to the tribal court, noting that under a long line of Supreme Court decisions, Indian tribes possess the power to regulate their internal and social relations,[32] and to make their own laws of inheritance.[33]

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[26] *Id.* at 1028.

[27] *Id.* at 1032.

[28] *See, e.g.*, Wear v. Sanger, 2 S.W. 307 (Mo. 1886).

[29] *See, e.g.*, Beaglehole, *Ownership and Inheritance In An American Indian Tribe*, 20 IOWA L. REV. 304 (1934-35).

[30] 457 F. Supp. 384 (D. Alaska 1978).

[31] *Id.* at 388.

[32] *Id.* at 389 (quoting United States v. Kagama, 118 U.S. 375, 381-382 (1886), and citing United States v. Wheeler, 435 U.S. 313 (1978)).

[33] *See, e.g.*, Jones v. Meehan, 175 U.S. 1 (1899). Even states which possess some civil

The court also noted the importance of allowing tribal courts to resolve disputes of this nature:

> When it is considered that there are present in this case complexities of Tlingit law in the area of descent and distribution, property concepts and language foreign to Anglo-American courts and that there are claims that these ceremonial objects are of vital importance to the heritage of the Village, it would be hard to imagine a more appropriate situation to apply the "well-established rule that courts will not interfere with the internal workings of Indian tribes."[34]

Hence, museums cannot assume that they have valid title to Indian cultural property merely because they are good faith purchasers of items originally sold by individual Indians. Where tribal law indicates that the individual Indian seller had no title to communal tribal property, the Indian claimants have a legal right to demand the return of the property regardless of the date of the unauthorized sale.[35] These legal guidelines fully support the recommendation of the AIRFA Report that museums should return religious property that was alienated from the Native communities "contrary to standards then prevailing in that community."[36]

Although there are no recently reported cases that involve competing museum and Indian ownership claims, tribal claims to communal property presently in the possession of museums may make up the largest single category of potential claims.

B. Acquisition of Objects that were Stolen from Indians

The AIRFA Report determined that many museums may have in good faith acquired cultural artifacts which were originally stolen.[37] However, museums cannot validly claim title to Native cultural property so obtained.[38]

Applicable United States law defines theft as any knowing possession of property belonging to any Indian tribal organization.[39] Federal criminal stat-

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jurisdiction over disputes between Indians are required to give full force and effect to tribal customs and ordinances adopted by tribes that are not inconsistent with applicable state law. 28 U.S.C.A. § 1360 (West 1976 & Supp. 1985).

[34] *Johnson*, 457 F. Supp. at 389 (citations omitted).

[35] Neither the United States nor Indian tribes are subject to state statutes of limitations which generally require that lawsuits be filed fairly shortly after the complained-of conduct arose. Moreover, under 28 U.S.C.A. § 2415(a) (West Supp. 1985), neither the United States nor Indian tribes are barred by the federal statute of limitations from bringing suit for damages on behalf of individual Indians. Thus, in Oneida v. Oneida Indian Nation, 105 S. Ct. 1245 (1985), the U.S. Supreme Court permitted an Indian tribe to enforce property rights to real property that had been illegally taken in 1795.

[36] AIRFA Report, *supra* note 5, at 81.

[37] *Id.* at 77.

[38] *See generally* Davies, *supra* note 8.

[39] 18 U.S.C.A. § 1163 (West 1984).

utes make it illegal to knowingly receive or possess such property.[40] The courts have held that affected Indian tribes have an implied private cause of action for damages in federal district court.[41]

The well-publicized Zuni War God controversy[42] offers a good illustration of the manner in which museums acquire stolen Native American objects. The Denver Art Museum received the gift of a sacred war god statue from a non-Indian donor. It was not disputed that the statue was communally owned by the Zuni Tribe of New Mexico and possessed great religious significance. Any removal of that statue from its original shrine on the reservation was known by the museum to be unauthorized and illegal.

In response to various arguments raised by the museum in opposition to returning the stolen object, the Colorado Attorney General issued an opinion holding that the museum had no interest, as a public trustee, in asserting a claim to stolen objects.[43] It was only then that the museum returned the statue to Zuni tribal officials.

Where it is clear that native sacred material was stolen, a museum must return the property unconditionally. While the exact extent of this problem is unclear, the AIRFA Report indicates that museum possession of stolen Native religious proerty is "widespread."[44] Museums should adhere to AIRFA guidelines regarding accession and deaccession to this category of artifacts.

C. *Acquisition of Objects Obtained by Excavation on Private Lands*

In general, museums should decline to accept tribal religious objects without careful scrutiny and should notify tribal religious leaders when they are offered a chance to acquire such objects. Until recently, the law appeared to favor museum title to Native cultural material obtained through excavation from privately owned lands over those of Native American tribes. American property law generally vests ownership of all artifacts or objects found on private land in the landowner.[45] Consequently, landowners could usually sell such artifacts to museums under this premise. Those objects include skeletal remains, burial goods, and other Native cultural resources embedded in soil.[46]

Both older[47] and more recent[48] federal legislation regulate the excavation of cultural resources on federal and Indian lands. Some states strictly regulate excavation on state or private lands—including Indian graves and sacred sites.[49] However, this is not done in a majority of the states. The paucity of such regulation presents serious problems for Native claims to artifacts obtained from state or private lands. The vast majority of Indian tribes were involuntarily removed from their ancestral homelands by the federal government and placed on reservations that were, in many instances, hundreds of miles away.[50] Private owners have subsequently acquired these lands, and, under American property law, were historically free to unearth, sell, or destroy the remains left behind by the original landowners.

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[40] *Id.*

[41] Cheyenne-Arapaho Tribes of Oklahoma v. Beard, 554 F. Supp. 1, 4 (W.D. Okla. 1980).

[42] *See* Davies, *supra* note 8; Blair, *supra* note 8.

[43] *See* Davies, *supra* note 8, at 2-3. Indeed, museums may not even have an "insurable interest" in stolen objects. Treit v. Oregon Automobile Ins. Co., 262 Or. 549, 550 n.2, 499 P.2d 335, 336 n.2 (1972), nor may they have standing in some states to maintain suit for damage to stolen goods or wrongful taking of them, Annot., 150 A.L.R. 163-254 (1944).

[44] *See* AIRFA Report, *supra* note 5, at 77-78.

[45] *See* Blair, *supra* note 8, at 17; Wilson & Zingg, *What Is America's Heritage? Historic Preservation and American Indian Culture*, 22 Kansas L. Rev. 413, 421 (1973-74).

[46] *See generally* Annot., 170 A.L.R. 707 (1947).

[47] 16 U.S.C.A. § 473 (West 1985).

The propriety of the excavation of former Indian lands has always raised fundamental conflicts between Indian people and amateur or professional archaeologists.[51] These conflicts are based largely on the disparate world views between Native people, who believe that disturbance of the dead and their burial goods should be avoided because it is offensive to religious belief, and archaeologists who claim a birthright to excavate in the name of science and education.[52]

The fundamental conflict between Native religious beliefs and the views of the dominant society is illustrated in *Newman v. State*.[53] In that case, Arnold Newman's friends discovered the opened coffin of a Seminole Indian, two years deceased, in the Florida Everglades. The skull was found lying on the ground a few feet from the coffin. Newman and his girlfriend subsequently went to the site in order to photograph it. Newman removed the skull, claiming that he thought it was abandoned, and was convicted under Florida criminal law for maliciously removing the skull.

On appeal, Newman's conviction was reversed on the ground that the state failed to present sufficient proof that Newman had acted with the requisite malicious intent.[54] The defendant's conduct was excused on the basis of character evidence that Newman "was a serious minded boy" who "liked to

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[48] Archaeological Resource Protection Act of 1979, 16 U.S.C.A. §§ 470aa-ll (West 1985).

[49] *See, e.g.*, CAL. PUB. RES. CODE §§ 5097.9-5097.99 (West 1984) (no one may use a state permit to damage Indian cemeteries or sacred sites; reinterment procedures provided; possession of Indian remains or grave artifacts prohibited after Jan. 1, 1984); WASH. REV. CODE ANN. § 27.44.010-020 (West Supp. 1986) (limitations placed on removal of Indian grave offerings); IOWA CODE ANN. § 305 A.7 (West Supp. 1975) (state archaeologist may reinter ancient human remains over 150 years old).

[50] *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); United States v. Michigan, 471 F. Supp. 192, 207-16 (W.D. Mich. 1979), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

[51] *See generally* Higginbotham, *Native Americans Versus Archeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91 (1982). There is presently no consensus among the professional archaeologists on these issues. *See* King, *Professional Responsibility In Public Archeology*, 12 ANN. REV. ANTHROPOLOGY 143 (1983); *The Question of Reburial: Archeologists Debate The Handling Of Prehistoric Human Skeletal Remains*, EARLY MAN, Autumn 1981, at 25. Moreover, the legal issues remain largely unresolved. *See* Higginbotham, *supra*.

[52] *See supra* note 51.

[53] 174 So. 2d 479 (Fla. Dist. Ct. App. 1965).

[54] *Id.* at 484.

tramp through the woods."[55] Insensitivity to the Native Americans' respect for the dead was evident in the court's inability to find that the act of removing the skull was malicious conduct *per se*—as would be likely had Newman's conduct occurred within a cemetery. The court accepted Newman's defense that he thought the skull was abandoned, apparently because of the unusual nature of Seminole Indian burial customs: "We have here an unusual situation which concerns unfamiliar and secret tribal burial customs involving as the setting a scene of disarray in a wild sawgrass and cypress swamp."[56] Thus because the general public was unfamiliar with Indian burial customs, the criminal laws of Florida did not protect the sanctity of a Seminole Indian grave. The court gave only lip service to the general notion that the sanctity of Indian burials should be given the same respect accorded to graves of other races.[57]

Although it is unclear whether the grave was located on private or state land, *Newman* illustrates problems which Native Americans have in securing legal protection in this area due to differences in cultural outlooks, the general lack of understanding of tribal burial practices, and callous disregard of the sanctity of Indian graves.

However, museums should be held to a stricter standard than the public. Museums are familiar with the potential harm caused by acquisition of objects obtained by excavation; thus, they must carefully assess the background title of Native skeleton remains and burial goods collected from private lands and offered for sale.

Charrier v. Bell[58] is a recent case which illustrates this point. In 1970, Leonard Charrier attempted to sell two and one-half tons of burial goods taken from 150 Tunica Indian graves, which he excavated from private land in Louisiana, to the Peabody Museum at Harvard University. On receipt of the burial goods, the Peabody Museum questioned Charrier's ability to convey legal title. This eventually led Charrier to start proceedings for quiet title, in which he asserted ownership under state law as the finder of abandoned property. The Tunica Indians intervened in the case, claiming title to their ancestors' burial goods. The court found that the burial goods had not been abandoned by the Tunica Indians—although the tribal burial ground was privately owned and bore no physical resemblance to a cemetery:

> It is generally accepted by the historians and urged here by the Tunicas that the latter's ancestors were interred with their earthly possessions for use in the spiritual hereafter . . . . They were burial goods then and they remain burial goods today, whether they are referred to as artifacts, funerary offerings or the "Tunica Treasure"

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[55] *Id.* at 482.

[56] *Id.* at 483.

[57] *Id.* at 484.

[58] Civ. No. 5,552 (20th Jud. Dist. La., Mar. 18, 1985), *appeal pending*, No. 85-0867 (filed Aug. 30, 1985).

> . . . . [W]e cannot agree that ownership of such objects may be acquired by reducing them to possession and over the objections of the descendants of the persons with whom the objects were buried. Reason dictates that these objects, when and if removed, rightfully belong to the descendants if they be known and for such disposition as the descendants may deem proper. We hold accordingly.[59]

The court did consider competing scientific and religious interests: "In some quarters, Charrier's discovery is viewed as an archaeological find of considerable significance. To others it is viewed as the systematic despoilation of . . . [the Tunicas] ancestral burial grounds. While we can fully appreciate the former view, it cannot override the equally considerable merit we find in the latter view."[60]

The *Charrier* decision addresses a serious gap in the development of the law and social policy of this country. If human remains and burial offerings of Native people are so easily desecrated and removed, wherever located, while the sanctity of the final resting place of other races is strictly protected, it is obvious that Native burial practices and associated beliefs were never considered during the development of the American law of property and the law of sepulcher. Yet, these *sui generis* beliefs and practices must be recognized more widely and accorded adequate legal protection if the law is to realistically and fairly protect the society which it is intended to serve. At least one court recognized this interest in the context of burial goods that were removed from private lands.

D. Acquisition of Objects Obtained by Excavation on Public Lands

Historically, Native cultural resources have been excavated from federal and Indian lands either by persons possessing permits under various federal statutes or by pot hunters who illegally expropriated those resources in violation of federal law.[61] Much has been written about the federal laws which protect cultural resources and govern excavation on public lands.[62] This section focuses on the legal avenues under which museums have historically acquired cultural resources.

The commentators agree that applicable federal legislation favors museums, which are entrusted with Native cultural resources excavated under federal permits. The Antiquities Act of 1906,[63] for example, allows properly qualified institutions to obtain permits for excavations, "subject to such rules and regulations" promulgated under the Act. Excavations must be "undertaken for the benefit of reputable museums" and the "gatherings shall be made for permanent preservation in public museums."[64] Any other type of excavation on public lands without permission is illegal. The underlying assumption of the Antiquities Act is that all "cultural resources" located on federal land "belong" to the United States, and can be excavated only for the benefit of public museums. There are no provisions for Native ownership or disposition.

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[59] *Id.* at 11, 12-13.

[60] *Id.* at 14.

[61] *See, e.g.*, AIRFA Report, *supra* note 5, at 77-78.

[62] *See, e.g.*, Cooper, *Constitutional Law: Preserving Native American Cultural and Archeological Artifacts*, 4 INDIAN L. REP. 93, 103 (1976); Wilson & Zingg, *supra* note 45; Suagee, *supra* note 4.

[63] 16 U.S.C.A. § 432 (West 1974).

The Smithsonian Institution purportedly reviews and makes recommendations on all Antiquity Act permit applications.[65] Collections obtained under these permits cannot be removed from public museums without the written authority of the Smithsonian.[66] If a public museum with such holdings ceases to exist, then the collection reverts back to "national collections and [shall] be placed in the proper national depository."[67] Hence, the Smithsonian has far-reaching authority over Native cultural resources under the Antiquities Act.[68]

The Antiquities Act not only fails to make any provision for Native interests in cultural resources; its criminal provisions have historically been ineffective. It was not until 1973, when the Act was almost seventy years old, that the first prosecution under its auspices was reported.[69] However, the criminal enforcement provisions of the Act were declared unconstitutionally vague, and the conviction was reversed.[70]

Though never formally repealed, the Antiquities Act has been largely superseded by the Archaeological Resources Protection Act of 1979 (ARPA),[71] and its uniform regulations.[72] ARPA covers only "archaeological resources"—any material remains of human life, including human remains, which are at least one hundred years old.[73]

The significant differences between the Antiquities Act and ARPA is that the latter cures the constitutional defects of the Antiquities Act, upgrades the criminal and civil sanctions, and expressly protects Native interests in cultural resources located on Indian land and, to a lesser degree, federal lands.[74] ARPA additionally requires that the uniform rules necessary to carry out its provisions be promulgated, "only after consideration of the provisions of the American Indian Religious Freedom Act."[75]

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[64] *Id.*

[65] 43 C.F.R. § 3.8 (1985).

[66] 43 C.F.R. § 3.17 (1985).

[67] *Id.*

[68] *See* Blair, *supra* note 8, at 21.

[69] *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

[70] In *Diaz* the government sought unsuccessfully to prosecute a pothunter who stole 22 Apache religious objects from a medicine man's cave located on the San Carlos Reservation.

[71] 16 U.S.C.A. §§ 470aa-ll (West 1985) [hereinafter referred to as ARPA].

[72] *See* 36 C.F.R. § 296.1 *et seq.* (1985) (regulations for the Dept. of Agriculture); 32 C.F.R. § 229.1 *et seq.* (1985) (regulations for the Secretary of Defense); 43 C.F.R. § 7.1 *et seq.* (1985) (regulations for the Secretary of the Interior); 18 C.F.R. § 1312.1 *et seq.* (1985) (regulations for Tennessee Valley Auth.). For an overview of ARPA, see Suagee, *supra* note 4.

[73] *See* 16 U.S.C.A. § 470bb(1) (West 1985); 43 C.F.R. § 7.3(a) (1985).

[74] Although all Antiquity Act permits that were issued prior to ARPA remain in effect, no further Antiquities Act permits are required for activities subject to ARPA provisions. 16 U.S.C.A. § 470cc(h) (West 1985).

ARPA reinforces the policy that archeological resources which are removed from public lands remain the property of the United States and will be preserved by a suitable museum.[76] However, a permit cannot be granted under ARPA for excavation on Indian lands without the consent of the Indian landowner or Indian tribe with jurisdiction over the lands.[77] The ultimate disposition of resources from those lands is subject to the consent of such Indian or tribe.[78] As to public lands not owned by Indians, ARPA requires that Indian tribes must be given notice of any permit which might result in harm to religious or cultural sites.[79] However, the Secretary of the Interior may regulate the manner in which archaeological resources removed from such lands shall be disposed.[80] Both the Antiquities Act and ARPA plainly state that excavation on public or Indian lands without a permit is illegal, and cultural resources obtained in that manner are subject to seizure.[81] Moreover, resources obtained without permits cannot be exchanged or possessed by anyone.[82]

Although no reported decisions exists, there is a potential dispute between the United States and Indian tribes over ownership of archaeological resources located on public lands. As the custodians of such resources, museums could be caught in the middle of such disputes. Tribes have vital cultural and religious interests in their historic artifacts.[83] Where human remains are at issue, generally only the next of kin has standing to exercise control[84] over the body.[85] However, where that right has been neglected,[86] more distant kin,[87] voluntary associations,[88] or courts of equity[89] have been held to possess the authority to protect bodies from unnecessary removal. Hence, some tribes may have standing to assert control over the ultimate disposition of the remains and burial goods of their ancestors found on public lands. Such claims might be particularly strong where the tribes did not voluntarily abandon their burial grounds,[90] and where the federal government treats those remains differently than the remains of other races.[91] Since the constitutionality of the ARPA ownership provisions and discriminatory treatment of Native skeletal remains are currently unresolved, it is important for museums to be aware of these issues.

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[75] 16 U.S.C.A. § 470ii (West 1985).

[76] 16 U.S.C.A. § 470cc(b)(4) (West 1985).

[77] 16 U.S.C.A. § 470cc(g)(2) (West 1985).

[78] 16 U.S.C.A. § 470dd (West 1985).

[79] 16 U.S.C.A. § 470cc(c) (West 1985).

[80] 16 U.S.C.A. § 470dd (West 1985).

[81] 43 C.F.R. § 3.16 (1985).

[82] 43 C.F.R. § 7.4 (1985).

[83] *See Johnson*, 457 F. Supp. 384.

[84] *See* Charrier v. Bell, Civ. No. 5,552 (20th Jud. Dist. La., Mar. 18, 1985), *appeal pending*, No. 85-0867 (filed Aug. 30, 1985).

[85] *See, e.g.*, Anderson v. Acheson, 132 Iowa 744, 110 N.W. 335 (1907).

[86] Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891).

[87] Codell Constr. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947).

[88] Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829).

[89] *See id.*; *Larson*, 47 Minn. 307, 50 N.W. 238.

[90] In Frost v. Columbia Clay Co., 130 S.C. 72, 124 S.E. 767 (1924), the court held that a burial place can be abandoned by the mere removal of remains to a more suitable location.

III
HANDLING AND REPATRIATION OF NATIVE RELIGIOUS PROPERTY

Since the passage of AIRFA, more attention has been given to issues relating to the handling and repatriation of sacred objects.[92] However, no lawsuits have been filed against museums under AIRFA, and Native Americans have not used the Act to make an *en masse* run on museum collections, as curators originally feared. Nor has the Act been the panacea for resolving infringements on Native religious freedom, as traditional Native religious practitioners initially hoped.[93] Nevertheless, federal museums are subject to the AIRFA policy to protect free exercise of Native religion, including the "use and possession of sacred objects."[94] Arguably, the same is true for non-federal museums which receive federal funds or possess collections under federal permits. While that policy does not dictate the unconditional return of sacred objects, nor mandate the handling and display of sacred objects in a particular way, the museum guidelines of the AIRFA Report merit careful review by all affected parties.[95]

Current literature reviews the various positions advanced by Indians and museums with regard to repatriation issues.[96] While the positions sometimes conflict, there are ways to successfully accommodate competing interests in

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While the *Frost* standard may not constitute the weight of authority, it cannot be said that many tribes, forcibly driven from their aboriginal homelands, voluntarily abandoned the burial grounds of their ancestors. *See, e.g.*, Wichita Indian Tribe v. United States, 696 F.2d 1378, 1380-84 (Fed. Cir. 1983). Merely moving a village site because of pressure from other Indian tribes does not constitute abandonment. Moreover, under federal law, a right or property is not abandoned unless there is intentional relinquishment. Edwards v. Arizona, 451 U.S. 477, 482-83 (1981).

[91] In *Sequoyah*, 620 F.2d 1159, *cert. denied*, 449 U.S. 953, the Cherokee tribe claimed that the TVA's action in excavating and removing Cherokee bodies for study was discriminatory where TVA also moved Caucasian and Black bodies, but reinterred the latter. Inexplicably, the court did not rule on the Cherokee's equal protection claim, and that issue therefore remains unresolved. However, in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955), Justice Black recognized in his dissent that unequal treatment of human remains by the government can raise serious questions "concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 80 (Black, J., dissenting).

[92] *See supra* note 8.

[93] *See generally* Echo-Hawk, *Natural Resource Development On Public Lands: Strategies For Protection Of First Amendment Rights*, 6 INDIAN L. SUPPORT CENTER REP. 10 (Oct. 1983); Michaelson, *"We Also Have A Religion" The Free Exercise Of Religion Among Native Americans*, AM. INDIAN Q. (Summer 1983).

[94] 42 U.S.C.A. § 1996 (West 1981).

[95] *See supra* note 10 and accompanying text.

[96] *See supra* note 8.

Native sacred objects.[97] The AIRFA guidelines rightfully provide that those sacred objects alienated from the tribes contrary to then prevailing tribal law or standards should be returned on request when needed for current religious practices. Many federal[98] and non-federal[99] museums have already followed those guidelines.

Although AIRFA does not impose any additional substantive religious rights beyond those already within the ambit of the free exercise clause of the first amendment, the courts have held that the Act does impose a *procedural* requirement to consider the impact of administrative actions on Native religious belief and practice.[100] Regardless of whether AIRFA applies to them, museums benefit from consulting with the relevant community on issues of repatriation and general handling of Native sacred objects.[101]

Moreover, AIRFA serves to clarify the legal capacity of state institutions to actively assist in preserving living Native communities. The courts have long held that the federal government has a trust duty to preserve native communities "as distinct cultural entities."[102] A state museum program which directly advances that federal trust duty is therefore lawful and constitutional.[103] This is also true for those museums that function under state laws that typically provide for a state interest in promoting and preserving the traditions and history of Indian tribes.

CONCLUSION

From society's standpoint it is important to preserve not only Native religious property, but also the irreplaceable Native beliefs and practices associated with that property. United States museums need not violate the religious and cultural traditions of the Native cultures which they seek to preserve.

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[97] *See* Hill, *Reclaiming Cultural Artifacts*, MUSEUM NEWS, May-June 1977, at 43-46.

[98] AIRFA Report, *supra* note 5, at 78, noted that the museums of the Department of the Army, Navy and Air Force are reviewing their collections for objects that may have religious significance, and will notify appropriate Native religious leaders and invite them to discuss the "return, long-term loans and/or care and handling" of those objects.

[99] *See* Blair, *supra* note 8 (such as the Heard Museum in Phoenix, and Wheelwright Museum in Santa Fe); Davies, *supra* note 8 (Denver Art Museum); Hill, *supra* note 97 (Buffalo and Erie County Historical Society); E. Childs, Repatriation and the American Indian: A Museum Dilemma (Dec. 1979) (unpublished manuscript) (available at Columbia University) (Museum of the American Indian-Heye Foundation at New York City, and Brooklyn Museum).

[100] *See* Wilson v. Block, 708 F.2d 735, 745-46 (D.C. Cir. 1983), *cert. denied sub. nom.* Navajo Medicinemen's Ass'n v. Block, 464 U.S. 1056 (1984); New Mexico Navajo Ranchers Ass'n. v. Interstate Commerce Comm'n, 702 F.2d 227 (D.C. Cir. 1983); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 597-98 (N.D. Cal. 1983) *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985).

[101] *See* Hill, *supra* note 97.

[102] *See, e.g.*, Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979) (citations omitted). That federal duty is made plain by the terms of AIRFA. Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639-40 (N.D. Tex. 1983); Frank v. Alaska, 604 P.2d 1068, 1073 n.9 (Alaska 1979).

[103] *Smith*, 556 F. Supp. 632; Livingston v. Ewing, 455 F. Supp. 825, 831 (D.N.M. 1978), *aff'd*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979).

Problems concerning property ownership, handling, and repatriation of Native cultural resources exist. Many of these problems can be resolved by acceptance of the simple notion that Indian peoples are members of living cultures that are entitled to respect and dignity in the eyes of the law. Certainly law and social policy is evolving in that direction.[104] By adopting the AIRFA Report standards, museums could play a leading role in this movement. Hopefully, this article provides a useful background for developing the special relationship between America's museums and Native Americans. Both parties, as well as the general public, have much to gain from developing that relationship.

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[104] The increasing need to evaluate historic properties under the National Historic Preservation Act, 16 U.S.C.A. §§ 470aa-ll (West 1985), for their importance to living, on-going, Native societies has been recognized by the Advisory Council on Historic Preservation. *See* Guidelines for Consideration of Traditional Cultural Values in HISTORIC PRESERVATION REVIEW (Draft) (Aug. 1985).

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT
Post Office Box 4408
Baton Rouge, Louisiana 70821

DATE: OCT 15 [illegible]　　　　DOCKET NUMBER: CA/85/0867

LEONARD CHARRIER

VERSUS

LOUISE LESSLEY BELL, ET AL

NOTICE OF JUDGMENT

TO:

J. Arthur Smith, III, Atty.
524 France St.
Baton Rouge, La. 70802

Donald Juneau, Atty.
1712 N. Street N. W.
Washinghton, D.C. 20036

Fred G. Benton, Jr., Atty.
601 St. Ferdinand St.
Baton Rouge, La. 70802

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeal, effective July 1, 1982.

CLERK OF COURT

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

Karen West
for STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE JUNE 29, 1984.

LEONARD CHARRIER

VERSUS

LOUISE LESSLEY BELL, ET AL

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER CA 85 0867

ON APPEAL FROM THE TWENTIETH JUDICIAL
DISTRICT COURT, PARISH OF WEST FELICIANA,
HONORABLE C. LEONARD SARTAIN, JUDGE
PRESIDING

BEFORE: EDWARDS, WATKINS AND PONDER*, JJ.

PONDER, J.

OCT 15 1986

Plaintiff appealed the trial court's judgment denying both his claim as owner of Indian artifacts and his request for compensation for his excavation work in uncovering those artifacts under the theory of unjust enrichment. We affirm.

Plaintiff is a former Corrections Officer at the Louisiana State Penitentiary in Angola, Louisiana, who describes himself as an "amateur archeologist". After researching colonial maps, records and texts, he concluded that Trudeau Plantation[1], near Angola, was the possible site of an ancient village of the Tunica Indians. He alleges that in 1967 he obtained the permission of Mr. Frank Hoshman, Sr., who he believed was the owner of Trudeau Plantation, to survey the property with a metal detector for possible burial locations. After locating and excavating approximately 30 to 40 burial plots, lying in a circular pattern, plaintiff notified Mr. Hoshman that he had located the Tunica village. Although the evidence is contradictory, plaintiff contends that it was at that time that Mr. Hoshman first advised that he was the caretaker, not the owner, of the property.

Plaintiff continued to excavate the area for the next three years until he had located and excavated approximately 150 burial sites, containing beads, European ceramics, stoneware, glass bottles; iron kettles, vessels and skillets; knives, muskets, gunflints, balls and shots; crucifixes, rings and bracelets; and native pottery. The excavated artifacts are estimated to weigh two to two and one-half tons.

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*Judge, Elven E. Ponder, retired, has been assigned temporarily to this court by the Supreme Court of Louisiana to fill the vacancy created by the election of Justice Luther F. Cole to the Supreme Court.

In search of a buyer for the collection, plaintiff talked to Dr. Robert S. Neitzel of Louisiana State University, who, in turn, informed Dr. Jeffrey D. Brain of Harvard University. Dr. Brain, who was involved in a survey of archeology along the lower Mississippi River, viewed the artifacts and began discussions of their sale to the Peabody Museum of Harvard University. The discussions resulted in the lease of the artifacts to the Museum, where they were inventoried, catalogued and displayed.

Plaintiff initially informed Dr. Neitzel and Dr. Brain that he had found the artifacts in a cave in Mississippi, so as to conceal their source; later he did disclose the actual site of the find to Dr. Brain, who had expressed his concern over the title of the artifacts. Dr. Brain then obtained permission from the landowners to do further site testing and confirmed that it was the true source of the artifacts.

Confronted with the inability to sell the collection because he could not prove ownership, plaintiff filed suit against the six nonresident landowners of Trudeau Plantation, requesting declaratory relief confirming that he was the owner of the artifacts. Alternatively, plaintiff requested that he be awarded compensation under the theory of unjust enrichment for his time and expenses.

The State of Louisiana intervened in the proceeding on numerous grounds, including its duty to protect its citizens in the absence of the lawful heirs of the artifacts. In 1978, the State purchased Trudeau Plantation and the artifacts from the six landowners and agreed to defend, indemnify and hold the prior owners harmless from any and all actions.[2]

In 1981 the Tunica and Biloxi Indians were recognized as an American Indian Tribe by the Bureau of Indian Affairs of the Department of the Interior. The Tunica - Biloxi Indians of Louisiana, Inc. intervened in the instant suit seeking title to the artifacts and the site of the burial ground. At the same time, the tribe removed the action to federal district court, where they also filed a parallel action seeking title to the artifacts. The federal district court, on September 8, 1982, remanded the matter to state court and stayed the parallel action. **Charrier v. Bell,** 547 F. Supp. 580 (M.D. La. 1982). The Tunicas then withdrew, without prejudice, their claim to the property where the artifacts were located and the State subordinated its claim of title or trust status over the artifacts in favor of the Tunicas.

The trial judge held that the Tunica - Biloxi Tribe is the lawful owner of the artifacts, finding that plaintiff was not entitled to the artifacts under La. C.C. art. 3423 as it read prior to amendment by Act No. 187 of 1982, which required discovery "by chance". The judge also found that plaintiff had no claim to the artifacts on the basis of abandonment under La. C.C. art. 3421, as it read prior to the amendment by Act No. 187 of 1982, because the legal concept of abandonment does not extend to burial goods.

The trial court also denied relief under the theory of unjust enrichment, finding that any impoverishment claimed by plaintiff was a result of his attempts "for his own gain" and that his presence and actions on the property of a third party placed him in a "precarious position, if not in legal bad faith."

The issues before this court are the adequacy of proof that the Tunica - Biloxi Indians are descendants of the inhabitants of Trudeau, the ownership of the artifacts, and the applicability of the theory of unjust enrichment.

Plaintiff first argues that the evidence that the members of the Tunica - Biloxi Indians of Louisiana, Inc., are legal descendants of the inhabitants of Trudeau Plantation was insufficient to entitle them to the artifacts. He asserts that federal recognition of the tribe "merely proves that the Tribe is the best representative of the Tunica Indians for purposes of receiving federal benefits," and points to evidence of intermixing by the Tunica tribe with other tribes.

The fact that members of other tribes are intermixed with the Tunicas does not negate or diminish the Tunicas' relationship to the historical tribe. Despite the fact that the Tunicas have not produced a perfect "chain of title" back to those buried at Trudeau Plantation, the tribe is an accumulation of the descendants of former Tunica Indians and has adequately satisfied the proof of descent. This is evident from the "Final Determination for Federal Acknowledgment of the Tunica - Biloxi Indian Tribe of Louisiana", Fed. Reg. Vol. 46, No. 143, p. 38411 (July 27, 1981), which specifically found that the "contemporary Tunica - Biloxi Indian Tribe is the successor of the historical Tunica, Ofa and Avoyel tribes, and part of the Biloxi tribe". The evidence supports the finding that at least some portion of the Tunica tribe resided at Trudeau Plantation from 1731-1764. No contrary evidence, other than that suggesting intermixing, was presented at the trial of this case. Plaintiff's argument is without merit.

Plaintiff next argues that the Indians abandoned the artifacts when they moved from Trudeau Plantation, and the artifacts became res nullius until found and reduced to possession by plaintiff who then became the owner.

Plaintiff contends that he has obtained ownership of the property through occupancy, which is a "mode of acquiring property by which a thing which belongs to nobody, becomes the property of the person who took possession of it, with the intention of acquiring a right of ownership upon it." La. C. C. art. 3412, prior to amendment by Act No. 187 of 1982.[3]

One of the five methods of acquiring property by occupancy is "By finding (that is, by discovering precious stones on the sea shore, or things abandoned, or a treasure.)" La. C.C. art. 3414, prior to amendment by Act No. 187 of 1982. Plaintiff contends that the artifacts were abandoned by the Tunicas and that by finding them he became the owner.

Both sides presented extensive expert testimony on the history of the Tunica Indians, the French, English and Spanish occupation of the surrounding territory and the presence or absence of duress causing the Tunicas to abandon the Trudeau site.

However, the fact that the descendents or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned. While the relinquishment of immediate possession may have been proved, an objective viewing of the circumstances and intent of the relinquishment does not result in a finding of abandonment. Objects may be buried with a decedent for any number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of relinquishing ownership to a stranger. Plaintiff's argument carried to its logical conclusion would render a grave subject to despoliation either immediately after interment or definitely after removal of the descendants of the deceased from the neighborhood of the cemetery.

Although plaintiff has referred to the artifacts as *res nullius*, under French law, the source of Louisiana's occupancy law, that term refers specifically to such things as wild game and fish, which are originally without an owner. The term *res derelictae* refers to "things voluntarily abandoned by their owner with the intention to have them go to the first person taking possession." P. Esmein, *Aubry & Rau Droit Civil Francais*, Vol. II, § 168, p. 46 (7th Ed. 1966). Some examples of *res derelictae* given by *Aubry and Rau* include things left on public ways, in the cities or to be removed by garbage collectors.

The artifacts fall into the category of *res derelictae*, if subject to abandonment. The intent to abandon *res derelictae* must include the intent to let the first person who comes along acquire them. Obviously, such is not the case with burial goods.

French sources have generally held that human remains and burial goods located in cemeteries or burial grounds are not "treasure" under article 716 of the French Civil Code and thereby not subject to occupancy upon discovery. **Blancherot v. Couilhy**, Bordeaux, 6 Aug. 1806, 38 Dalloz Jurisprudence Générale, § 186 n. (1), p. 230 (1857). The reasoning has been that any contrary decision would lead to and promote commercial speculation and despoilment of burial grounds. The French commentator Demclombe noted the special treatment that should be given to burial goods, stating that such objects "have not been placed underground with the same intention which informs the deposit of what is called treasure, which in the latter case is, for a temporary period . . . . Rather, they are an emplacement for a perpetual residence therein. . . ." 13 C. Demolombe, Cours de Code Napoleon § 37, pp. 45-46 (2c ed. 1862).

The same reasoning that the French have used to treat burial goods applies in determining if such items can be abandoned. The intent in interring objects with the deceased is that they will remain there perpetually, and not that they are available for someone to recover and possess as owner.

For these reasons, we do not uphold the transfer of ownership to some unrelated third party who uncovers burial goods. The trial court concluded that La. C. C. art. 3421, as it read prior to passage of Act No. 187 of 1982, was not intended to require that objects buried with the dead were abandoned or that objects could be acquired by obtaining possession over the objections of the descendants. We agree with this conclusion.

The cases cited by plaintiff are distinguishable.

In **Touro Synagogue v. Goodwill Industries of New Orleans Area, Inc.,** 233 La. 26, 96 So.2d 29 (1957), the court found that a cemetery had been abandoned for burial purposes and the owner had the right to sell the property; however, the court conditioned the sale on the disinterment and reinterment (in another cemetery) of the remains of the deceased.

In **Ternant v. Boudreau,** 6 Rob. 488 (1844), jewelry interred with the decedent was stolen and recovered. The plaintiff claimed the ownership of all such goods on the basis that he purchased the decedent's succession from defendant who was the heir. The court found that the plaintiff was the lawful owner of the jewelry since there had been a valid sale from the descendant. The sale evidenced an express intent by the descendant not to retain ownership of the burial goods.

The court in **McEnery v. Pargoud,** 10 La. Ann. 497 (1855) found that the temporary use of land as a cemetery, from 1794 to 1800, did not exclude it from commerce. There was no mention of the abandonment of the remains of the dead or the burial goods and there is no inconsistency in that decision and the opinion stated herein.

Humphreys v. Bennett Oil Corporation, 195 La. 531, 197 So. 222 (1940) merely acknowledges that descendants have a cause of action against a person who disturbs a cemetery.

Plaintiff strongly argues that a finding that Indians did not abandon the artifacts will necessarily require the federal court to conclude that the Tunicas did not abandon the real property at Trudeau Plantation and could work havoc with the stability of Louisiana land titles. However, the question of the abandonment of the real property was excluded from the case. This opinion should not be interpreted as making any expression thereon.

Plaintiff next argues that he is entitled to recover a sum of money to compensate his services and expenses on the basis of an actio de in rem verso.

The five criteria of such a claim de in rem verso are:

> (1) there must be an enrichment,
> (2) there must be an impoverishment,
> (3) there must be a connection between the enrichment and resulting impoverishment,
> (4) there must be an absence of justification or cause for the enrichment and impoverishment, and
> (5) there must be no other remedy at law available to plaintiff.
> **Creely v. Leisure Living, Inc.** 437 So.2d 816 (La. 1983);
> **Edmonston v. A-Second Mortgage Company of Slidell Inc.,** 289 So.2d 116 (La. 1974).

We first question whether there has been an enrichment. While the nonresident landowners were "enriched" by the sale of the property to the state, the ultimate owners of the artifacts presented substantial evidence that the excavation caused substantial upset over the ruin of "ancestrial burial grounds," rather than any enrichment.

Even if the Indians have been enriched, plaintiff has failed to prove that he has sustained the type impoverishment for which de in rem verso, may be used. His alleged loss resulted from the hours he spent excavating the artifacts, the greater portion of which activity was done at a time when plaintiff knew he was on property without the consent of the landowner. While contradictory testimony was presented regarding whether plaintiff initially had permission to go on the property, and whether that permission was adequate, by his own admission, plaintiff was informed by Hoshman that he did not own the property before the cessation of the excavating. Plaintiff's knowledge is further evidenced by his attempts to keep the location of his work secret; he did not identify Trudeau Plantation as the location of the find for almost five years after his discovery and he failed to seek out the landowners of the property until it was required for sale negotiations, although he removed two and one half tons of artifacts from their property. Plaintiff further acknowledges that he knew that the Tunica Indians might object to his excavations.

The actio de in rem verso, explained by the Louisiana Supreme Court in **Minyard v. Curtis Products, Inc.**, 251 La. 624, 205 So.2d 422 (1967) and derived from the similar French action, is influenced greatly by French Civil Code articles from which our own are copied. **Minyard,** 205 So.2d 432. The impoverishment element in French law is met only when the factual circumstances show that it was not a result of the plaintiff's own fault or negligence or was not undertaken at his own risk. Comment, **Actio De In Rem Verso in Louisiana; Minyard v. Curtis Products,**

Inc., 43 Tul. L. Rev. 263, 286 (1969); **Brignac v. Boisdore**, 288 So.2d 31, 35 n.2 (La. 1973). Obviously the intent is to avoid awarding one who has helped another through his own negligence or fault or through action taken at his own risk. Plaintiff was acting possibly out of his own negligence, but more probably knowingly and at his own risk. Under these circumstances, plaintiff has not proven the type of impoverishment necessary for a claim of unjust enrichment.

Additionally, plaintiff has failed to show that any enrichment was unjustified, entitling him to an action to recover from the enriched party. An enrichment will be unjustified "only if no legal justification for it exists by reason of a contract or provision of law intended to permit the enrichment or the impoverishment or to bar attack upon the enrichment." Justice A. Tate, **The Louisiana Action for Unjustified Enrichment**, 50 Tul. L. Rev. 883, 904 (1976). Any enrichment received by the Tribe was justified. **Humphreys v. Bennett Oil Corp.**, 195 La. 531, 197 So. 222 (1940); **Choppin v. LaBranche**, 48 La. Ann. 1217, 20 So. 681 (1896). In **Humphreys**, the court recognized a right of action to recover damages for mental anguish and pain and suffering for desecration of a cemetery, while **Choppin** allowed injunctive relief against a tomb owner threatening to remove remains of the dead. Thus, descendants have a right to enjoin the disinterment of their deceased relatives, as well as to receive damages for the desecration involved. Such a right would be subverted if descendants were obliged to reimburse for the expenses of the excavation. See **V & S Planting Company v. Red River Waterway Commission**, 472 So.2d 331 (La. App. 3rd Cir. 1985), writ denied, 475 So.2d 1106 (1985); **G. Woodward Jackson Co., Inc. v. Crispens**, 414 So.2d 855 (La. App. 4th Cir. 1982). There is a legal justification for any enrichment received by the Tribe and plaintiff is not entitled to invoke the equitable theory.

For these reasons the judgment of the trial court is affirmed at appellant's costs.

AFFIRMED.

FOOTNOTES

[1] Trudeau Plantation consists of approximately 150 acres located on a bluff in the southeast quadrant of the meeting of the Mississippi River and Tunica Bayou. Angola is on the other side of the bayou.

[2] Plaintiff filed a motion for litigous redemption which was granted by the trial court, but rejected by this court. The matter was remanded for trial. **Charrier v. Bell,** 380 So.2d 155 (La. App. 1st Cir. 1979).

[3] La. C.C. art. 3412, 3414 and 3421 cited herein were repealed by Acts 1982, No. 187, § 1, effective January 1, 1984. The provisions replacing those articles reproduce their substance. Although the language has changed, they do not change the law. See specifically La. C.C. art. 3412 and 3418, as adopted by Acts 1982, No. 187, § 1 and the comments. The articles previously read as follow:

> La. C.C. art. 3412
>
> Occupancy is a mode of acquiring property by which a thing which belongs to nobody, becomes the property of the person who took possession of it, with the intention of acquiring a right of ownership upon it.
>
> La. C.C. art. 3414
>
> There are five ways of acquiring property by occupancy, to wit:
>
> By hunting.
>
> By fowling.
>
> By fishing.
>
> By finding (that is, by discovering precious stones on the sea shore, or things abandoned, or a treasure.)
>
> La. C.C. 3421
>
> He who finds a thing which is abandoned; that is, which its owner has let [left] with the intention not to keep it any longer, becomes master of it in the same manner as if it had never belonged to any body.

PREPARED

STATEMENT OF CYNTHIA GRASSBY BAKER
CHAIRMAN, ADVISORY COUNCIL ON HISTORIC PRESERVATION

Mr. Chairman and Members of the Committee, I am Cynthia Grassby Baker, Chairman of the Advisory Council on Historic Preservation. I am pleased to offer testimony on behalf of the Council regarding S. 187, the "Native American Cultural Preservation Act."

The Congress created the Council as an independent Federal agency. The Council is composed of 19 members, including heads of Federal departments, representatives of State and local government and the historic preservation community, and non-federal members appointed by the President. We have two principal duties: to advise the President and the Congress on matters concerning the national historic preservation program, and to oversee the process established under Section 106 of the National Historic Preservation Act to protect historic properties from needless harm by Federal activities.

Section 106 requires Federal agencies to take into account the effect of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places. Through Section 211 of the Act, the Congress authorized the Council to promulgate regulations to govern the implementation of Section 106. These regulations are found at 36 C.F.R. Part 800.

Under Section 106, we review nearly 1,500 projects each year, ranging from the construction of reservoirs and highways to the rehabilitation of historic buildings and the issuance of Federal permits. Many of the cases we review, particularly in the West, involve effects on places of cultural importance to Indian tribes, including places associated with the practice of traditional religious rituals, and places where the dead are buried. In the latter context, we often deal with the

disposition of human remains and the artifacts that are associated with them. Often these must be excavated in advance of a project that will disturb them, such as the construction of a highway or a pipeline. Thus although we are not involved in the specific topic addressed by S. 187, the repatriation of human remains and artifacts now housed in museums, we are familiar with the general issues involved in accommodating the interests of American Indian cultures.

The Council recently revised its Section 106 regulations. Adopted by unanimous vote of the membership, the revisions took effect October 1, 1986. One of the objectives of the revisions was to promote greater participation of the public, including Native Americans, in the Section 106 process. The revised regulations articulate a clear role for Indian tribes and Native Americans, primarily in Section 800.1.

The regulations encourage the participants in the Section 106 process to be "sensitive to the special concerns of Indian tribes," to carry out their responsibilities under the regulations in a manner consistent with tribal procedures for historic preservation where feasible, and to afford traditional cultural leaders and other Native Americans the opportunity to participate in consultation about the protection of properties significant to them.

The Council has also recently completed a major study entitled The National Historic Preservation Act of 1966: An Assessment of Its Implementation of Over Twenty Years. The assessment, copies of which we will be pleased to make available to the Committee, includes a section devoted to participation by Indian tribes and other Native Americans in historic preservation activities. A copy of that section is appended to this testimony for the record. The inclusion of a special section on the topic reflects the Council's concern for the careful treatment of Native American concerns in the national historic preservation program.

While the Council has not had an opportunity to formulate a position on S.187, I believe the general directions set forth in the assessment are relevant to the subject. In particular, the committee should note the discussion regarding treatment of human remains. Although the Council has not reached consensus on the specific question on whether human remains excavated by archeological projects should be systematically turned over to Indian tribes and other Native Americans for reburial, the Council did conclude that Federal law, including the Archeological Resources Protection Act, "should permit enough flexibility to allow reburial to occur when cultural and religious interests in human remains outweigh their scientific significance."

This is an important and sensitive area of the national historic preservation program that merits careful assessment of the competing interests. The Council wishes to be of assistance to the committee in addressing these questions. I will be placing S. 187 before the Council in the near future for its review and consideration. We will be pleased to provide the committee with our further views on this issue.

SOCIETY FOR AMERICAN ARCHAEOLOGY

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TESTIMONY

on

THE NATIVE AMERICAN CULTURAL PRESERVATION ACT (S. 187)

before the

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

February 20, 1987

Mr. Chairman and Distinguished Committee Members:

My name is Leslie E. Wildesen. I personally have been involved with both Indians and archaeology for over 20 years: my first field project was funded through the American Indian Historical Society, in the San Francisco bay area, in 1967. It consisted of salvaging human remains and artifacts from a prehistoric Ohlone cemetery slated for destruction by a shopping center. Since then, I have worked with Ohlone, Paiute-Shoshone, Lummi, Umatilla, Klamath, Tshimsian, Coos, Cheyenne, Southern Ute, and Sioux people on a number of similar issues.

I am here this morning on behalf of the Society for American Archaeology, the oldest and largest organization in the United States that focuses on the archaeology of the Americas. The Society was founded in the 1930's as a forum for integrating the views and interests of professional archaeologists with all those interested in the ways of life on this continent before its occupation by Europeans.

Over the past decade, I have watched the Society, as a group of dedicated professionals, struggle with the value conflicts inherent in the scholarly study of native peoples by immigrant peoples. I have arranged for, and attended, meetings of the Society's Executive Committee with representatives of pan-Indian organizations. I have watched members of the Society debate various points of view about the ethics of responsibility to their clients, and to the public at large, and to scholarship in general, and to the future of humanity, and have participated in developing policies that articulate the desires and beliefs of these members.

This morning I would like to focus on a series of consensus points, developed over the past few years in discussions among Society members, and between Society members and officers and other interested parties: Indians, lawyers, ethnologists, physical anthropologists, and museum professionals. I suppose you could call this a list of "things the Society supports", as worked out and negotiated among all those parties.

This list contains many of the same things this bill seems to be about: equity, dialog, dispute resolution, protection of heritage, consultation, training, and technical assistance.

Let me elaborate a bit.

First, the Society for American Archaeology supports the preservation of our human heritage for future generations. Archaeologists know that this heritage cannot always be preserved in place, in the ground where it has lain for millennia, so we support the scientific study of the evidence of that heritage, and the preservation of that evidence in books and museums. Many archaeologists believe passionately in academic freedom, the opportunity to conduct research of their own choosing, to follow their research wherever it leads, to share their insights and discoveries with their colleagues at meetings and in journals, and to share with the public their sense of wonder and newly-understood knowledge revealed by their studies.

Secondly, the Society for American Archaeology supports increased participation, education, and interpretation of, for, and by, Indians of the native American heritage of this nation. Why should foreign scholars do all the work? Where are the native scholars, to foster pride in their material history, to explain to the newcomers about the last 12,000 years of history, to pass that knowledge and pride along to the next generations, Indian and non-Indian alike?

The Society also has gone on record in support of local-level solutions to local-level issues. Perhaps a clearer term is "specific" solutions to specific problems. For no matter how universal a "problem" may be, it still boils down to a specific dispute, or issue. Archaeologists and Indians in this country have an excellent track record of working one-on-one to resolve these issues as they arise. Solutions have been developed in Idaho, Oregon, Washington, Iowa, Massachusetts, California, Oklahoma, Alaska, Louisiana, New Mexico, South Dakota, Colorado, Utah - everywhere people have treated each other with dignity and honestly sought a resolution to the specific issue.

The Society supports equity and dignity for all groups and individuals. That's one of the reasons for archaeology: to elucidate the past so that we might all benefit in the future. The study of prehistoric agriculture in the American southwest, for example, has shown that modern water allocations are based on unusually abundant supplies, during a sequence of unusually wet years. This knowledge can help in the design of water projects that benefit both the Indian and non-Indian farmers in the area today, and in the future.

Finally, the Society for American Archaeology supports continued cooperation and coordination among all the parties, both on an individual basis and in organized ways between groups. Many individual archaeologists and Indians have a long history of working together on difficult issues, relating to human remains, sacred artifacts, sacred geography, and archaeological scholarship. The Society would like to see such individual traditions expanded and continued, for the benefit of all.

As you might expect, there are also ideas the Society cannot support. The Society cannot support proposals for universal or indiscriminate "reburial" of all human remains, at least in part for the simple historical reason that many human remains, Indian and non-Indian, were never buried in the first place. One of the most important facts that archaeology has shown about past human religious life is that traditions of how to deal with the newly dead vary widely across space, among cultural groups, and time within the same cultural group. Thus, today the definition of what is "proper" to do to honor a deceased friend or relative is different depending on whether you are Cheyenne or Hopi or Nez Perce, Orthodox Jew or Buddhist or Catholic, Chinese or Nigerian or Spanish.

In view of the Society's policy of support for specific, local approaches to dispute resolution, the Society cannot support the idea of national-level, legislated "solutions" such as that proposed in S. 187. We have some serious concerns about the lack of balance on the proposed Native American Museum Advisory Board, about the inequity of penalties, about the absence of appeal from decisions of the Board, and the proposal for prior censorship of research findings. But most importantly, we believe that a national board will solve no important problems for Indians, archaeologists, or museums.

In my conversations and experiences over 20 years in this field, it is clear to me that there are, indeed, a variety of "problems" to be solved: more money for Indian museums, more emphasis on preventing looting of archaeological resources, more coordination and communication, more sharing of information about particular Indian beliefs and practices, more protection for sacred objects and landscapes, and more enforcement of existing legislation, such as the American Indian Religious Freedom Act (AIRFA) and the Archaeological Resources Protection Act (ARPA). The present bill will solve none of those problems.

We believe that it might be unwise to open ARPA up for amendment at this time, but if the Committee decides to move forward, we suggest some changes that would strengthen the ability to protect sites and convict violators. For example, now any fines that are collected go to the general treasury. We suggest that these fines go into a special fund, to help the agency restore the site that was damaged. To make it easier to gain convictions, we suggest defining any excavation into a site as a felony offense, thus avoiding the problem of calculating the "scientific cost" of the damage. Dollars and cents cannot adequately measure the loss of an irreplaceable heritage.

It must be clear that the Society for American Archaeology cannot support S. 187, although it contains some ideas we could enthusiastically support in another form. We would be happy to work with the Committee to further develop some of these concepts, or to propose specific language, should that be desired.

Mr. Chairman, the Society may wish to submit more detailed testimony for the hearing record; will the record be open for 30 days?

I would be happy to respond to any questions you might have.

Prepared Statement of Leslie E. Wildesen
Society For American Archaeology

My name is Leslie E. Wildesen. I personally have been involved with both Indians and archaeology for over 20 years: my first field project was funded through the American Indian Historical Society, in the San Francisco bay area, in 1967. It consisted of salvaging human remains and artifacts from a prehistoric Ohlone cemetery slated for destruction by a shopping center. Since then, I have worked with Ohlone, Paiute-Shoshone, Lummi, Umatilla, Klamath, Tshimsian, Coos, Cheyenne, Southern Ute, and Sioux people on a number of similar issues.

I am here this morning on behalf of the Society for American Archaeology, the oldest and largest organization in the United States that focuses on the archaeology of the Americas. The Society was founded in the 1930's as a forum for integrating the views and interests of professional archaeologists with all those interested in the ways of life on this continent before its occupation by Europeans.

Over the past decade, I have watched the Society, as a group of dedicated professionals, struggle with the value conflicts inherent in the scholarly study of native peoples by immigrant peoples. I have arranged for, and attended, meetings of the Society's Executive Committee with representatives of pan-Indian organizations. I have watched members of the Society debate various points of view about the ethics of responsibility to their clients, and to the public at large, and to scholarship in general, and to the future of humanity, and have participated in developing policies that articulate the desires and beliefs of these members.

This morning I would like to focus on a series of consensus points, developed over the past few years in discussions among Society members, and between Society members and officers and other interested parties: Indians, lawyers, ethnologists, physical anthropologists, and museum professionals. I suppose you could call this a list of "things the Society supports", as worked out and negotiated among all those parties.

This list contains many of the same things this bill seems to be about: equity, dialog, dispute resolution, protection of heritage, consultation, training, and technical assistance.

Let me elaborate a bit.

First, the Society for American Archaeology supports the preservation of our human heritage for future generations. Archaeologists know that this heritage cannot always be preserved in place, in the ground where it has lain for millennia, so we support the scientific study of the evidence of that heritage, and the preservation of that evidence in books and museums. Many archaeologists believe passionately in academic freedom, the opportunity to conduct research of their own choosing, to follow their research wherever it leads, to share their insights and discoveries with their colleagues at meetings and in journals, and to share with the public their sense of wonder and newly-understood knowledge revealed by their studies.

Secondly, the Society for American Archaeology supports increased participation, education, and interpretation of, for, and by, Indians of the native American heritage of this nation. Why should foreign scholars do all the work? Where are the native scholars, to foster pride in their material history, to explain to the newcomers about the last 12,000 years of history, to pass that knowledge and pride along to the next generations, Indian and non-Indian alike?

The Society also has gone on record in support of local-level solutions to local-level issues. Perhaps a clearer term is "specific" solutions to specific problems. For no matter how universal a "problem" may be, it still boils down to a specific dispute, or issue. Archaeologists and Indians in this country have an excellent track record of working one-on-one to resolve these issues as they arise. Solutions have been developed in Idaho, Oregon, Washington, Iowa, Massachusetts, California, Oklahoma, Alaska, Louisiana, New Mexico, South Dakota, Colorado, Utah - everywhere people have treated each other with dignity and honestly sought a resolution to the specific issue.

The Society supports equity and dignity for all groups and individuals. That´s one of the reasons for archaeology: to elucidate the past so that we might all benefit in the future. The study of prehistoric agriculture in the American southwest, for example, has shown that modern water allocations are based on unusually abundant supplies, during a sequence of unusually wet years. This knowledge can help in the design of water projects that benefit both the Indian and non-Indian farmers in the area today, and in the future.

Finally, the Society for American Archaeology supports continued cooperation and coordination among all the parties, both on an individual basis and in organized ways between groups. Many individual archaeologists and Indians have a long history of working together on difficult issues, relating to human remains, sacred artifacts, sacred geography, and archaeological scholarship. The Society would like to see such individual traditions expanded and continued, for the benefit of all.

As you might expect, there are also ideas the Society cannot support. The Society cannot support proposals for universal or indiscriminate "reburial" of all human remains, at least in part for the simple historical reason that many human remains, Indian and non-Indian, were never buried in the first place. One of the most important facts that archaeology has shown about past human religious life is that traditions of how to deal with the newly dead vary widely across space, among cultural groups, and time within the same cultural group. Thus, today the definition of what is "proper" to do to honor a deceased friend or relative is different depending on whether you are Cheyenne or Hopi or Nez Perce, Orthodox Jew or Buddhist or Catholic, Chinese or Nigerian or Spanish.

In view of the Society's policy of support for specific, local approaches to dispute resolution, the Society cannot support the idea of national-level, legislated "solutions" such as that proposed in S. 187. We have some serious concerns about the lack of balance on the proposed Native American Museum Advisory Board, about the inequity of penalties, about the absence of appeal from decisions of the Board, and the proposal for prior censorship of research findings. But most importantly, we believe that a national board will solve no important problems for Indians, archaeologists, or museums.

In my conversations and experiences over 20 years in this field, it is clear to me that there are, indeed, a variety of "problems" to be solved: more money for Indian museums, more emphasis on preventing looting of archaeological resources, more coordination and communication, more sharing of information about particular Indian beliefs and practices, more protection for sacred objects and landscapes, and more enforcement of existing legislation, such as the American Indian Religious Freedom Act (AIRFA) and the Archaeological Resources Protection Act (ARPA). The present bill will solve none of those problems.

We believe that it might be unwise to open ARPA up for amendment at this time, but if the Committee decides to move forward, we suggest some changes that would strengthen the ability to protect sites and convict violators. For example, now any fines that are collected go to the general treasury. We suggest that these fines go into a special fund, to help the agency restore the site that was damaged. To make it easier to gain convictions, we suggest defining any excavation into a site as a felony offense, thus avoiding the problem of calculating the "scientific cost" of the damage. Dollars and cents cannot adequately measure the loss of an irreplaceable heritage.

It must be clear that the Society for American Archaeology cannot support S. 187, although it contains some ideas we could enthusiastically support in another form. We would be happy to work with the Committee to further develop some of these concepts, or to propose specific language, should that be desired.

Mr. Chairman, the Society may wish to submit more detailed testimony for the hearing record; will the record be open for 30 days?

I would be happy to respond to any questions you might have.

Prepared Statement Of Robert McCormick Adams
Secretary, Smithsonian Institution

Thank you, Mr. Chairman.

I appreciate the invitation of the Committee to appear today and to share the views of the Smithsonian Institution on S.187, the Native American Cultural Preservation Act. While I have no doubt that the bill is well-intended, it seems unnecessary. Furthermore, it appears to be based on the assumption that museums and Native American people are by inclination, if not by nature, antagonistic to one another and, thus, require intervention by a third party to resolve their differences.

To the contrary, most museums, I believe, are sympathetic to the needs and concerns of Native Americans with respect to museum collections and recognize the necessity of returning human remains and sacred materials when legal and moral considerations warrant doing so. At the same time, most Native American groups appreciate the important role that museums play in educating the general public about Native Americans and in preserving their cultural heritage.

On a number of occasions Native American people have expressed the view that many of their cultural materials would not have been preserved if the Smithsonian had not existed. In at least one instance, the Institution has been designated as custodian of material belonging to Native American religious societies no longer in existence.

The major concerns of both museums and most Native American groups are the treatment of Native American collections in a manner consistent with the place of the objects in their societies of origin and, if objects are to be returned to Native groups, that the proper items be returned to the proper people.

As you consider the pending legislation and the issues surrounding it, I thought it may be helpful to have an outline of the nature and uses of the Smithsonian collections that contain sacred artifacts and human skeletal remains. I would also like to describe our handling of requests for the repatriation of objects and specimens from those collections, as well as the wide range of activities that we have in place, and are planning, to make our collections more accessible to those represented in them.

* * *

The archeological collections of the Smithsonian's National Museum of Natural History are among the largest in existence. Certainly, our North American collections, which make up the greatest percentage, are the most important reference collection available in a single repository for scientific study. The North American collections span all major cultural periods from the first peopling of the New World to historic times and encompass all regional areas. Although the quality of documentation for them varies, the collections are continually being utilized and restudied by scholars from all over the world.

New research techniques and equipment have added to the importance of our collections. Dating techniques such as archeomagnetism, thermoluminescence, obsidian hydration, and atomic particle acceleration provide refined chronological frameworks in which to order archeological cultures and developments. Studies such as those of trace elements in the composition of clays and pigments utilized by prehistoric potters show us not only the quarry locations of their raw materials, but also trade connections and spheres of cultural interaction.

The development of scanning electron microscopy has added a new dimension to functional studies of artifact classes. It is now possible to microscopically identify use-wear patterns on tool edges which are characteristic of specific tasks. By plotting the distribution of use-wear occurrences and associated tool kits, the researcher gains a sensitive indicator of patterned activities at archeological sites. These types of data sets drawn from objects in the collections allow new interpretation of prehistoric economic and social behavior.

Techniques for identifying blood proteins recently have been applied to the examination of residue found on prehistoric stone and bone tools, providing information on the species of animal from which the blood came. These studies promise significant impact on the determination of tool use and on more accurate assessments of prehistoric food procurement and warfare.

Archeological resources are non-renewable and are being destroyed by urban encroachment and financially motivated looting at the same time that analytical capabilities are rapidly advancing and providing investigators with more sophisticated tools with which to study archeological materials. The advent of computerized data bases has increased the ability to undertake the broad comparative studies that are important to the eventual understanding of cultural development and change through time. Just as no thoughtful researcher would think of discarding a library reference book after one examination, as if it had served its purpose, so, too, archeological reference materials, artifacts, and their documentation, are reexamined time and time again as research orientation, techniques of investigation, and specific scientific questions change. Thus, the North American Archeological Collection of the National Museum of Natural History can be compared to the Library of Congress or to the National Archives as a resource on which scholars depend for assistance in their research efforts.

Unlike those entities, however, the use of the Smithsonian's archeological collections more frequently extends beyond archeologists and other scholars. The collections are available for loan to museums and other institutions for both research and public display. They are also used in travelling exhibitions and for illustrating a wide variety of educational publications, films, and even postage stamps. Increasingly loans are being made to museums operated by Native Americans as these institutions develop facilities and expertise. Hence, the collections are important to various nationally based educational programs and are seen not only in the museums on the Mall but also in institutions across the land where they contribute to scientific and humanistic knowledge about American Indian history and development.

Most of the Smithsonian's archeological collections were obtained over the past 150 years by excavations, the techniques and standards of which have evolved in that same period, at Indian campgrounds and dwelling places. A small portion came from excavations of burial sites, of which an even smaller portion came from burials in which human remains were present. Very few artifacts can be described as "grave goods" from sites of late prehistoric or early historic cemeteries; most are from sites of archeological cultures whose ethnic ties with historically known Indian tribes cannot be determined with any degree of certitude.

Inclusion of artifacts in graves, by itself, does not mean that such objects were considered _sacred_ by those that buried them, if we can judge this issue by comparison to most historically documented Indian burial practices. Generally, pots, implements, and items of personal property are included in Indian burials in the same manner that items of personal property are included in Christian or other burials. In only a very few cases can the _sacredness_ of grave goods be established even in recent Indian burials; determination of this status in ancient graves has to be based largely on speculation and personal, rather than scientific, judgment. Some archeologists have described grave goods as being of a religious nature simply because they could not determine any other practical function for the specimens. Hence, the determination in any particular case of a particular items being sacred is at best difficult.

The issue is also complicated by the variability of the concept of sacred among different Indian groups. Some Native American methods of disposing of their dead did not involve the concept of sacredness, which was restricted to the ceremonial process at the time of disposal rather than to the remains themselves.

The ethnological collections present another area in which the complexity of Native American concepts of sacred are apparent. In repatriation requests to date the Smithsonian has focused on the issue of ownership rather than on that of sacredness because the nature of title to a particular object often can be used to establish its religious status. In some instances the two may be connected as, for example, with communally owned religious objects that clearly could not be sold or otherwise transferred by an individual.

Over the past six years we have resolved two requests from tribes for the repatriation of religious objects by returning them. In the first case a Pueblo group requested a ceremonial vessel. Our review of its history revealed that the vessel had been removed improperly from the Pueblo in the late 19th century. Our curator personally returned the vessel to the Pueblo in 1982, handing it over to appropriate religious officials.

Just recently we completed negotiations with the Zuni in New Mexico for the return of two war gods and related objects. While negotiations, which consistently were positive and non-confrontational, were in progress, we cooperated in producing an exhibit of Zuni ceramics that was displayed both at Zuni Pueblo and at the Smithsonian.

With respect to the Smithsonian's research collections of human skeletal remains, they, too, are among the largest in the world, numbering nearly 33,000 entries for the entire collection with more than 18,000 representing Indians from North America. Because of the quality of this collection, it is among the most frequently researched in the Institution. Scholars arrive continually to study the documentation and collect data to pursue a wide range of problems ranging from the history of disease among American Indians to prehistoric culture.

Despite our scholarly interest in these remains, we are, indeed, sensitive to the fact that they are those of human beings. In addition, we recognize that, as I shall describe shortly, some of the remains are those of identifiable ancestors of Native American people.

Nonetheless, the research value of the collections cannot be overlooked. The historical record on the culture and biology of the first Americans does not begin until well after initial European contact. Any hope of moving beyond oral history and ethnographic analogy in the reconstruction of the past rests with archeological approaches to prehistory. Our ability to assess all biological factors and many biocultural aspects completely depends upon our recovery, curation, and analysis of well-documented human remains.

Modern analysis continues to document sex ratios, age profiles, stature, body build, and general skeletal variation. In addition, today's researchers can address issues of diet through chemical analysis, activity patterns and occupation/behavioral problems, and even social structure through biocultural analysis of mortuary site data. By using computers and sophisticated measurements and observations of discrete traits we can now attempt to discern genetic relationships among prehistoric groups and resolve problems posed from cultural data of the migration of peoples and/or the diffusion of ideas among groups.

Skeletal remains are critical in a wide range of problem-oriented studies that range from the use of teeth as tools in prehistoric societies to documenting cultural practices of deformation, such as the use of labrets. Prehistoric skeletons are nearly the complete data base for the entire subfields of paleopathology and paleodemography. The former has gone beyond attempting to document particular diseases into an epidemiological approach that has produced exciting new data on disease factors in prehistoric adaptation and temporal biocultural change.

The collections have benefited medicine, as well as modern forensic studies. An intriguing problem of contemporary medicine, for example, is the increased incidence of erosive joint disease such as rheumatoid arthritis that occurs in some American Indian groups as compared to American whites. It is important to understand the biological and historical factors that are related to this observed difference and to consider factors such as genetics, nutrition, and exposure to infectious agents. Clearly, the only means for medical researchers to untangle this problem and add vital historical time depth to ongoing clinical studies rests with our collections and others like it.

Even though extensive research has been conducted on these human remains and many publications derived from them, scientific interest in them seems to be increasing. Again, new technology, especially computers with sophisticated statistical analysis, equipment for chemical and microscopic analysis, and renewed academic interest in skeletal studies related to problem-oriented research has contributed largely to this increase. New approaches offer prospects of dietary reconstruction from the skeleton by means of chemical analysis of isotope and trace elements in bones and teeth. Improved methods of radiocarbon dating suggest that more accurate dates increasingly will be possible; this is particularly important to supplement existing documentation to establish or improve archeological provenience, and thereby making the collections even more valuable for other types of studies.

The value of our collections will increase further because of limits to the archeological excavation of new material and the deterioration of museum collections elsewhere. Our collections will be called upon in the future to augment the studies mentioned earlier and to establish pre-European contact baseline data on lead levels in bone, disease frequency, and other issues.

They represent a unique, irreplaceable archive of biocultural data that offer us the understanding of many aspects of the history of the human condition on this continent.

With respect to the repatriation of human skeletal remains, we have tried to be responsive to all of those concerned about the issue, but to negotiate the return of specific remains with elected officials of tribes themselves.

Currently underway is an effort to establish the documentation of all human skeletal remains in our collections that represent known individuals and/or individuals from known American Indian tribes. Our research has revealed that we have the remains of forty-five individually identifiable American Indians in our collections; they were transferred to us years ago from the Army Medical Museum. As complete documentation on them is established, we plan to approach each of the tribes represented in an attempt to find descendants. If they can be found, we expect to abide by their wishes with respect to the remains.

A little more than a year ago, in an effort to inform the American Indian community about our holdings and to give them the opportunity to share whatever sentiments they cared to express about them, we mailed to the chairmen of the 225 Federally-recognized tribes in the continental United States copies of a computer printout providing statistics on our North American Indian skeletal collection, along with a letter of explanation about our methods of storage and visitor access.

Six tribes responded with various comments and requests. In each of these cases we complied fully by providing the information sought as rapidly as we could assemble it. In all but one of the cases the tribes appear to have been satisfied.

The Blackfeet of Montana, until just last week, represented the exception. In researching their initial request for information, we discovered that 15 crania, some with mandibles, and one radius and ulna had been stolen from a known Blackfeet cemetery at the Blackfeet Agency in 1892. The material was collected for the Army Medical Museum and later transferred to us. The Blackfeet were informed that we would be willing to deaccession and transfer the material to them because it was acquired in an unethical manner.

On Tuesday, February 11, representatives of the Blackfeet were here in Washington and shared with one of our curators the desire of the tribe to locate and transfer to the reservation known Blackfeet individuals. They have approached several museums where they believe such remains have been held. Blackfeet spiritual leaders believe that spirits of the individuals still linger around the remains and feel compelled to try to bring those spirits back to the reservation. If successful, they plan to bury the remains on a ridge on the reservation and erect a suitable monument.

Our curator stated our intention to deaccession and transfer the 15 crania and related artifacts when study and casting are complete. He also summarized the research that has been conducted on the material to date and discussed with the tribal representatives the importance of that research to their own tribal history and public health, noting that the crania are remarkably free of dental disease and developmental defects, in contrast to what is believed the condition to be among contemporary Blackfeet. The health aspect may aid in determining population relationships from morphological assessment which has direct implications for the attempts of the tribe to locate the skulls of ancestors in other museums.

The representatives encouraged our curator to take the time needed to complete his study and to ensure that only Blackfeet material would be transferred. They did not want to take a chance that a non-Blackfeet skull might be included and recognized that the study could help in the examination of potential transfers from other museums. It was agreed that they would notify the curator when Blackfeet material was in question and that he would help them with further assessment. They also agreed that because of the importance scientifically of this known reference collection, casting of the remains would be desirable, and they authorized the conduct of whatever scientific analysis was appropriate to prepare the material for transfer.

The actions, Mr. Chairman, of reasonable people, explaining and honoring the traditions of their diverse cultures, will, I submit, do far more to enhance and preserve the needs and traditions of each than would the intervention of third parties, no matter how well-intended. Our experience affirms my belief that sensitive issues such as these should be negotiated directly with the affected tribes on a case-by-case basis. This will ensure that the enormous complexity of each issue will be treated with care and thoughtfulness, and that the outcome will be mutually acceptable.

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The Smithsonian has been deeply involved in American Indian research and study since its inception. In addition to on-going museum activities such as those I have described, a variety of others constitutes our more specific Native American Program. Designed to provide access to and use of institutional resources by Native Americans, such a program does, of course, also provide enhanced knowledge of Native American history and culture to the public at large.

The American Indian Program at the National Museum of Natural History is dedicated to making the wealth of the Institution more accessible to the communities from which that wealth - the collections - was originally gathered. It is hoped that this will enhance exchanges between the Smithsonian and Indian communities that will, in turn, lead to a revitalized sense of partnership and cooperative ventures of mutual interest.

In order to improve accessibility of our collections to Native American communities, the Natural History program is reviewing the possibility of developing a video disk project by which, at relatively low cost, we could put into the hands of the Indian and non-Indian public images and text about our entire North American ethnology collection. The project could be expanded to include archeological materials, as well as photographs in our National Anthropological Archives. It would make the collections available to individual Indians who cannot travel to Washington to view them directly, to scholars for preliminary research planning, and to museum professionals for building exhibits.

We also believe that a series of tribal catalogs would be well-received. These would be exhaustive surveys and descriptions of tribal holdings in our collections, including ethnographic and archeological objects; film and photographs; and archival materials. The basic research would be done by one or more tribal members fluent in their native language and having some research experience. The project would result in a printed catalog describing in great detail all Smithsonian holdings for a particular tribe which should be of substantial utility for tribal members, museum professionals, scholars, and the public. A proto-type based on our Kiowa holdings is now being developed with a grant of $26,000 from non-Federal resources of the Institution. The associated research is being conducted by a native Kiowa scholar.

While the tribal catalog series is intended for those tribes that are represented by artifacts and archival material in our collections, others are represented primarily by native texts and music stored in the National Anthropological Archives. These tribes would be invited to participate in projects where native speakers would work with the texts for purposes determined and designed by the tribal communities such as bi-lingual, bi-cultural materials, educational curriculum materials in English, and new translations. The Smithsonian would benefit from linguistic research done in partnership with tribes, while tribes would gain language materials previously inaccessible to them.

Other activities under consideration include "suitcase" exhibits to fill particular needs of tribes and keyed to their unique, socio-cultural heritage. We also hope to develop a source of funds for increased participation by the elders, religious leaders, and cultural committee members of Indian tribes, as well as Native American students and professional scholars. We would solicit applications from these Native experts, particularly those who have not already visited the collections, and accommodate their research interests once here. Their comments about the collections would be added systematically to existing documentation to enrich our understanding and that of future generations of Native Americans and other researchers.

The American Indian Program at the Smithsonian's National Museum of American History was established in 1984 and designed to address the omission of American Indians in American history in museum programming at the Smithsonian and in U. S. museums in general. Examples of the Museum's approach can be found in the installation of the Iroquois section of a new permanent exhibit on daily life in 18th century America and in the American Indian Program's future plans.

The exhibit on the influential political and economic entity, the Iroquois Confederacy, and specifically, the Seneca Nation, was developed in consultation with Iroquois scholars and with religious and political leaders. It casts an Iroquois perspective on history and on the artifacts that tell that story, and takes the viewer to the present implications of the Iroquois past in the context of American history. A slide-tape-booklet package in English and in Seneca is being developed from the exhibit for teachers and students.

The Museum plans to follow this with a series of audio-visual resource kits on topics such as: American Indians and the U. S. Constitution, American Indian agriculture and plant knowledge, American Indian women, and American Indian astronomy and mathematics. The program also hopes to initiate a desktop publishing and a traveling exhibition program featuring co-productions with Indian museums, educational institutions, and scholarly organizations.

The goal of the Native American Museums Program in our Office of Museum Programs is the creation of a leadership core of Native American people who are professionally qualified for employment in museums and related institutions. The program conducts workshops, conferences, and seminars; it supports internships and residencies, provides technical assistance and liaison services, and produces publications and audiovisual material that enable participants to understand and implement the basic operations and research functions of cultural institutions. It also provides career counseling and fosters a communication network among Native Americans and related public and private agencies and organizations.

Through our Office of Fellowships and Grants funding is available to Native American students and scholars to work at the Institution on independently conceived research and directed projects. Funding also is available to Native American students and community-affiliated Indians to support projects requiring use of the Institution's Native American resources and undertaken in residence at the Smithsonian.

For a number of years a program of American Indian presentations was an integral part of the Smithsonian's Festival of American Folklife. Most visible was the 1976 Bicentennial program which featured a wide range of Indian music, foodways, dance, and crafts from a sizeable number of tribes over a twelve week period. Since then Native American representation has been included in state presentations and through individual participation in the Festival's Cultural Conservation program which has featured events focusing on comparative Indian musical styles, Indian architecture, and traditional Ojibway culture.

Beginning in the summer of 1988, the Office of Folklife Programs plans returning to an annual program that will focus on the variety of Indian historical conditions. A typical Festival presentation will include performance and crafts components organized by genre (beadwork, boat-building, singing, dance, etc.) and will highlight the richness and variety of Native American expressive culture. In addition, the presentation will include a "learning center," designed to address contemporary cultural issues of Native Americans through museum-type exhibits, discussions by panelists, and videotape or slide showings where appropriate.

In the area of publishing, the Smithsonian is preparing a new 20-volume Handbook of North American Indians, of which seven volumes have been completed. The Handbook will summarize scholarly knowledge of the history and the cultures of all North American Indians and Eskimos from the earliest prehistoric times to the present. A number of Native Americans have contributed to the series, both as volume editors and as chapter authors. The work should become a standard reference encyclopedia not only for university teachers and students, researchers, and writers in the social sciences and humanities, but also for the general public, including Indian people and those whose jobs or interests relate to some aspect of Indian life and culture.

For an even broader audience the Institution published in 1986 The Smithsonian Book of North American Indians. More than 60,000 copies have been sold.

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In closing, Mr. Chairman, I think it important to draw attention to the magnitude of the lurking costs associated with S.187. As a single example, I would refer to Section 6(d) which would require any museum that, in effect, has had contact with Federal funds to "prepare a provenance of all skeletal remains of Native Americans, sacred artifacts, and other artifacts and collections relating to Native American history or culture, that are under the control of such museum."

No funds are authorized for such an undertaking, the scope of which is staggering. While it is difficult to estimate the size of all Native American collections in the United States, some figures are available in the publication Systematic Research Collections in Anthropology; others may be arrived at by comparison to our own collections.

Native American material in the North American collections of the Smithsonian's National Museum of Natural History consist of 377,631 records, each of which may include a number of items all sharing the same provenience. Collections in the rest of the nation would account for at least 3,000,000 to 3,500,000 more records. At a conservative estimate, one hour per record would be required to establish or verify the provenience data, with more time required for ethnological material and less for archeological. Using a figure of $10 per hour, $3.78 million would be required for Smithsonian collections; $30 to $35 million would be needed for records elsewhere in the nation.

The manipulation of such masses of data would require the establishment of a nationwide computer network and the transfer of all institutions' computer systems, where they exist, to a single shared program. While this would greatly enhance the use of collections for research and exhibit planning, we estimate that $500,000 to $1,000,000 would be required solely for the transfer of Smithsonian records.

Mr. Chairman, at a time when we are acutely conscious of the limits of Federal resources, and experiencing vigorous competition for those from the private sector, I would suggest that a careful look at priorities and the application of existing resources is in order. Over time, many of the goals sought by the proposed bill can, I believe, be achieved by using funds that are available among various agencies in the Federal establishment, as well as modest additional increments, to aid existing organizations and institutions, particularly tribal museums, by providing varieties of training for native people, offering technical assistance to strengthen their institutions, and easing access to museum collections throughout the country.

Assuredly, the Smithsonian will continue its efforts. I would hope, too, that our experience might provide both a model and a process for other museums in their work with tribal organizations. Certainly, we would be responsive to requests to help facilitate similarly cooperative and productive arrangements between other museums and Native American tribes.

The Smithsonian also will continue to encourage vigorous enforcement of Federal and state laws to protect prehistoric and historic sites and artifacts. Looting of these sites and objects irreplaceably destroys precious cultural resources of the Native American community and of our larger community as a nation.

SMITHSONIAN INSTITUTION
Washington, D.C. 20560
U.S.A.

February 26, 1987

Honorable Daniel K. Inouye
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Toward the conclusion of the hearing on S.187 on February 20th it was indicated that the record of the hearing would remain open for a week in order to permit witnesses to supplement their testimony with additional views or information. I am writing to take advantage of the opportunity thus provided.

A key Smithsonian expert in studies of our Native American collections is Dr. Douglas H. Ubelaker. He is a physical anthropologist, specializing in the study of our North American skeletal materials. Unfortunately, he was out of town at the time of the hearing, so that I was unable to draw upon his knowledge during the course of the hearing. Since his return, however, I have had an opportunity to consult with him further.

I indicated in my testimony that there are approximately 45 skeletons in our collections that appear to be those of Native American individuals who can be individually identified. All of these skeletons were transferred to the Smithsonian from the Army Medical Museum around the turn of this century. We are currently completing studies to assure ourselves of the identity of these individuals, and of the band or tribal groupings to which they belonged. As soon as these studies have been completed we plan to contact the groups concerned with a view to determining descendants, if possible, and following their wishes with regard to the further disposition of the skeletons.

What I was not aware of at the time of the hearing is that there is a somewhat larger group of about 174 other skeletal remains, also turned over to the Smithsonian by the Army Medical Museum, whose status is more ambiguous. None of these individuals, so far as we are now aware, can be identified by name. On the other hand, the accompanying records indicate that these remains were picked up by Army personnel on battlefields or in known cemetery areas where their tribal affiliation can be ascertained with greater or lesser probability. I can assure the Committee that the Smithsonian will examine this material and the accompanying records with great care, and notify tribal leaders in all cases where the available information is sufficiently complete to make deaccession and transfer of the material appropriate.

With limited specialized personnel to conduct these studies, our first priority is to make casts of and then complete the return of the Blackfeet crania referred to in my prepared testimony, following arrangements already agreed upon with the Blackfeet. The second priority, on which we also assume there will be general agreement, is to complete the identification of the named individuals, and to notify their tribes and descendants. Thirdly, the Smithsonian's physical anthropological specialists will give their attention to the 174 individuals about which I am now informing you.

I would be grateful if you would make this supplementary information part of the record of the hearing.

Sincerely yours,

Robert McC. Adams
Secretary

Prepared Statement of J. Edson Way, Director
Wheelwright Museum of the American Indian

The Wheelwright Museum of the American Indian, formerly the Museum of Navajo Ceremonial Art, supports the perceived intent of S.187 but cannot support this piece of legislation as written. Furthermore, the perceived assumption of an adversarial relationship between Native American peoples and Museums is counter to the history and experiences of this Museum and, enacted, would possible create an environment detrimental to the current state of good relations between the Wheelwright Museum and the Native American members of our public constituencies, Board, staff and friends.

The Wheelwright Museum, founded in 1937, exists within a sacred circle of Pollen, Corn Meal, and Hard Offering. The Museum was dedicated by Ten Navajo medicine men for the first time 50 years ago, and was redidicated in 1977 and 1985. The Museum is a private, non-profit institution, founded by Mary Cabot Wheelwright of Boston, Massachusetts, and Hosteen Klah, esteemed Navajo medicine man from Newcomb, Arizona. The Museum was established as a repository to "preserve for study ceremonial objects, recordings of changes and descriptions of traditional rituals." This occurred at a time when these were imperiled by United States Government policy and during a movement among Navajo people to "modernize" and become assimilated into the dominant Euro-American culture. With changed social attitudes, the Museum has twice deaccessioned approximately 20 ceremonial bundles, masks and ritual paraphernalia since 1977, and repatriated them by giving them to the Navajo Community College, Tsaile, Arizona, for distribution among contemporary Navajo traditional practitioners. In addition, the Museum was the first institution to return Zuni War Gods to the appropriate officials--two years before the passage of the Native American Religious Freedom Act. The Museum still holds the title to other ceremonial objects left to the Museum by Hosteen Klah in accord with traditional Navajo custom in such matters. The Museum continues to loan objects from the collection to recognized religious leaders of the tribe for the benefit of the Navajo people. We still feel bound by the restrictive nature of Klah's action in the placement of his property in the Museum to maintain ownership of these items.

At the present time, Native American people are welcomed to attend exhibitions on Native American art and culture, to listen to tapes, study transcriptions, review designs of sacred drawings and occasionally borrow objects from the permanent collections. Most of these objects would never be placed on public display, and furthermore, Native American consultants are paid to advise Museum staff on the appropriateness of exhibition selections and the accuracy and limits of information to be made available to the uninitiated. We do not collect nor hold human remains. We have Native American employees on our professional staff, have paid Native American consultants to create the curriculum of our Educational Outreach Program and are governed by the Board of Trustees which is comprised at this time of slightly more than 50 per cent Native American members. We offer free seminars on Museum techniques in collections management and exhibition design for students at the Santa Fe Indian School and the Institute of American Indian Art and offer internship and volunteer opportunities for both Native American and non-Indian students, to encourage entrance into the museum profession.

All of this interaction between Native American people and the Museum has been accomplished without Bill S.187 on the basis of respectful dialog between the Museum staff and Native American people and with the occasional assistance of the National Endowment of the Arts, National Endowment for the Humanities, Institute of Museum Services, and the National Science Foundation funds, as well as private financial support.

We find the formation of the "advisory board" as defined in S.187 to be unbalanced in its composition and not equally representative of all concerned parties to the issues to be addressed. We feel there is already sufficient Federal law to guarantee the rights of all Americans, regardless of ethnicity, in any dispute between museums and our diverse public constituencies in the event that respectful dialog cannot resolve conflicting concerns regarding the treatment of items in museum collections. Further, we fear that enactment of S.187 may encourage factionalism within the range of opinion regarding the concept of the "sacred" in the Native American community, foster idiosyncratic claims against museums, and place an undue financial burden on smaller museums under threat of such action to the detriment of continued quality professional collections care and preservation, and thus deny access to such collections to future generations.

J Edson Way

Dr. J. Edson Way
Director,
Wheelwright Museum of the
American Indian

Prepared Statement of Thomas A. Livesay, Director
Museum of New Mexico

MUSEUM OF NEW MEXICO POSITION STATEMENT WITH REGARD TO S187, THE "NATIVE AMERICAN CULTURAL PRESERVATION ACT"

The Museum of New Mexico agrees with the concept of S187 that museums must be sensitive to legitimate Native American historical claims to objects in collections. However, the implementation of the law, as written, would be potentially highly destructive at the local level. The enactment of S187 would create an Advisory Board with powers and authority far beyond "advisory". By appointing six tribal elders/ceremonial leaders the legislation ignores a very basic principle of Indian relations: no one tribe or individual can speak for, or about, another - especially in the area of ceremonial and religious affairs. It would be presumptuous for any national group to assume such a position, even by inference.

Another major problem concerns the determination of "sacred artifact". Under the terms of the Bill "sacred artifact" means any material which is devoted to, or dedicated to, a deity or some Native American religious purpose and utilized for the conduct and observance of Native American religion by an Indian tribe or by any individual who is a Native American. This interpretation is extraordinarily broad and would directly effect a large number of artifacts held in legal trust for various federal and state agencies by the Museum of New Mexico. The Advisory Board would have the authority to intercede between Native American groups and Museums to provide an interpretation of "sacred artifact" and rule whether or not the artifact should be returned.

There is no need for national regulation because the local system works, and no national rule can be as sensitive to local problems. It is sensible to amend and strengthen existing regulations if necessary, but there is no current need to add a new level of regulation to the hierarchy. A description of the present system in New Mexico follows. It is grounded in 78 years of experience, state and federal laws and a profound concern for ethical relations with all the people of the state.

It is the policy of the Museum of New Mexico to treat human remains and other sensitive objects with respect and to carefully balance the needs of the Museum with the religious and spiritual concerns of people of various beliefs. Museum of New Mexico policy (SRC Rule 11) states:

> "Whenever possible, curators will make a serious effort to obtain the approval of the cultural group involved before acquiring or placing sensitive materials in the collection. If there are serious objections to sensitive materials in the collection, the Museum of New Mexico will consider legal return, or exchange of such items upon written request from groups having a legitimate historical claim upon the objects."

The Museum of New Mexico actively seeks the guidance of Native American groups in the handling of potentially sensitive material from its 15 member Advisory Committee. This committee includes representatives from the Rio Grande, Acoma, Zuni and Hopi Pueblos, the Navajos, Western Apache and Jicarilla Apache Tribes. In short, the Museum of New Mexico has an effective mechanism in place for consulting with all of the major Indian cultures in New Mexico and northern Arizona.

Acquiring new materials for the collection by purchase or gift must be done in accordance with the Museum of New Mexico policy and in consultation with the

Indian Advisory Committee. Dealing with older collections is done on a case-by-case basis upon written request from groups having a legitimate historical claim upon the objects. An example of the sensitivity is the Museum's recent return of three Zuni War Gods following a written request from the Zuni Indian Tribe. Other cases are currently being considered, such as a request from Cochiti Pueblo to return several kiva bells from an archaeological site excavated over 20 years ago.

The Museum of New Mexico is a primary repository for archaeological materials derived from Federal and State lands in New Mexico. Federal regulation [43 CFR Part 7.7, especially 43 CFR Part 7.7(b)] requires consultation between all interested parties concerning the satisfactory disposition of materials from archaeological sites. We are constantly working with federal land managers to maintain and enhance this process of consultation. The resolution of each particular case is a balance of various social and religious interests expressed by local citizens of all ethnic backgrounds (not just Native American), and the principle expressed in all of our laws, federal and state, that the public has a right to the information about the past.

In New Mexico over the past seventy five years this interest in the past has taken many forms. For example, Native American people regularly visit the Museum of New Mexico collections to derive inspiration for their contemporary crafts. The collections have always been open to all the people from whom the collections originated. Many new trends in Indian pottery, (e.g., as at Acoma and San Ildefonso Pueblos), have been inspired by Pueblo potters viewing the Museum collections. The information from archaeological sites in our collection has been used by many tribes in their land claims cases, often to the considerable benefit of the tribes. Tourism obviously is a major consideration in New Mexico and our exhibits using the museums collections and the knowledge of the past derived from them by carful research draw many people to the state. This educational process creates an environment of sympathetic understanding between the diverse people of the Southwest.

S187 bypasses the local relationship and the rapport that we have built up over many years and replaces it with a board and administrators far removed from the people of New Mexico and their unique concerns and the complex array of land owners and managers with whom they must interact. These are local matters that can best be handled by local people who must work together as neighbors on many other issues (water rights, land claims, taxation, schooling and so forth), and therefore, are used to developing satisfactory solutions to problems with many facets.

The Museum of New Mexico is the official state repository for archaeological field collections from all state land and much of the federal land in the state. Accessioning of these collections is done in harmony with Museum of New Mexico policy (SRC Rule 11):

> Archaeological activities of the Museum of New Mexico often result in the recovery of potentially sensitive cultural materials. The recovery and documentation of such materials will attempt to balance the imperatives of the scientific research and cultural resource management with the religious and spiritual concerns of living people. Human remains, sacred objects, and other sensitive material will be treated with respect.

> Whenever possible, and without compromising scientific research objectives, living groups with legitimate historical relationships to sites, human remains, and sacred objects will be consulted about the proper care and handling of sensitive materials [emphasis added]. The Museum of New Mexico reserves the right to restrict public access to ongoing archaeological excavations if, in the judgement of the field supervisor, such access poses a threat to scientific data recovery or the religious and spiritual concerns of living people.

All of the human skeletal material under the curatorial charge of the Museum of New Mexico is routinely transferred under long term loan to the University of New Mexico Osteological Laboratory, where they can be properly conserved, curated and analyzed.

Archaeologists from the Museum of New Mexico have worked for years with the Office of the Medical Investigator and police on determining the appropriate disposition of human remains found in archaeological contexts. Recently a human skull dating ca. A.D. 1250 was found by the police near Pojoaque Indian Pueblo. Upon consultation with BIA officials, the Office of the Medical Investigator, the State Archaeologist, and Pojoaque Pueblo officials, the skull was turned over to the tribe for reburial in the tribal cemetery. Shortly thereafter, the Pojoaque Tribe requested that Museum of New Mexico archaeologists remove prehistoric human skeletal remains from an eroding road cut on pueblo lands. The Museum removed the remains, documented their condition and context, and returned the material to the Pueblo for reinterment.

Our experience is that it is best to negotiate with the various parties within a flexible legal matrix that allows case-by-case solutions that are mutually satisfactory to all concerned. This is in agreement with the range of our various state laws that deal with human remains that are not of an archaeological nature. The important point is that when interested parties step forward to express concern, our existing legal structure is flexible enough to permit the return of the materials.

Consideration of the proper policy, program and regulations for protection and repatriation of sensitive cultural artifacts must, by definition, include a process. The process is delicate, frequently complex, and must be based on mutual understanding and respect if it is to be successful. A distant authority, superimposed over this local and highly personal process, would undermine existing relationships, to the detriment of all concerned.

We have learned that a successful process includes the following principles:

1.) each case is unique;
2.) each case is culture specific;
3.) each case depends on a constantly evolving set of definitions authorities, and prerogatives formulated by each individual tribe.

Because of the complexity and highly relative nature of issues involving definitions, identification, and tribal relations with local, state, and national institutions as well as outside individuals, it is more prudent to reevaluate existing measures for general cultural property protection and preservation. Where such rules, regulations and laws are inadequate, they may be amended to include the process of consultation and communication that benefits the museum, university, and Indian communities in understanding each others needs.

New Mexico has a long history of amicable and productive tribal-museum relationships. The Zuni Tribe is a case in point. Through legal channels and negotiations with the Denver Art Museum, the Museum of New Mexico and others, the Zunis have been successful in negotiating the return of the "Twin War Gods" to their rightful place for proper curation according to tribal standards. The Zunis are in the process of negotiating with the Smithsonian Institution for the return of several items of a sacred nature including additional Twin War Gods. The tribe has its own archeological studies program and has a strong policy enforcing treatment of skeletal remains from on and off the reservation.

Since the New Mexico record and established policies have been successful, they might well provide models useful in other instances where existing laws and regulations need modification.

The "Advisory Board" is charged with the authority to settle disputes between various Native Americans and museums. Such disputes would involve the skeletal remains of Native Americans or "sacred artifacts of such Indian tribe(s). The objections of the Museum of New Mexico to this bill center on the authority of this Advisory Board to define the term "Sacred artifact" and the subsequent power it is granted to remove these artifacts from Museum collections without compensation or legal recourse in the courts.

If the Museum of New Mexico had not acted in a responsible fashion for the past 78 years, much of the cultural heritage from Southwestern Native American tribes would have been lost or destroyed. The material objects probably would have been lost simply because it is not in the Indian concept to collect and save things. In New Mexico the religious aspects of Indian cultures are still viable and a functioning part of our communities. Therefore, from this perspective there seems to be no need to collect and save. New things will be made as needed. But, as we now know, had the Museum of New Mexico failed to collect and preserve these objects a substantial part of the Indian heritage would have been lost. This collective knowledge has been shared with the people of New Mexico through publications, on-going research, exhibitions and other programs since 1909. It is the Museum's philosophy exemplified through the new Museum of Indian Arts and Culture, that not only can other people learn about Native Americans, but through our resources, Native Americans can learn about their past and prepare for their future.

Thomas A. Livesay, Director
Museum of New Mexico
February 25, 1987

Prepared Statement of Edward H. Able, Jr., Executive Director American Association of Museums

The American Association of Museums appreciates the opportunity to comment on S. 187, the "Native American Cultural Preservation Act". AAM is a national service organization of more than 10,000 institutional and individual members, representing the interests and concerns of museums of all kinds, museum professionals, volunteers and trustees. America's museums play a unique and critical role in collecting, preserving and exhibiting the diversity of the nation's cultural, scientific and natural heritage. They are repositories not only of objects, but of human values, accomplishments and creativity.

Museums offer the opportunity for an understanding of many societies and cultures in a variety of ways: through the acquisition of objects, the preservation of collections, research and publishing, exhibitions and public education programs. Native American collections exist in literally hundreds of museums across the nation. These institutions have played an indispensable and essential role in helping to preserve, research, and interpret Native American artifacts and culture. Had museums failed to do so, a substantial part of the heritage and culture of Native Americans may have been lost. Public understanding and appreciation of that culture has also been shaped, in part, through museum exhibitions. Yet the museum community is mindful of its ethical responsibilities in regard to human remains and sacred artifacts.

The American Association of Museums has been actively involved in promoting sound policies on the management, maintenance and conservation of all museum collections. In Museum Ethics, a report endorsed by AAM in 1978, the section on human remains and sacred artifacts states:

> Research, which provides the very basic foundation of knowledge, is a dynamic and therefore continuing process. It is essential that collections of human remains and sacred objects upon which research is based not be arbitrarily restricted, be securely housed and carefully maintained as archival collections in scholarly institutions, and always be available to qualified researchers and educators, but not to the morbidly curious.
>
> We have learned much about human development and cultural history from human burials and sacred objects. There is merit in continuing such investigations. But if we are to maintain an honorable position as humanists concerned with the worth of the individual, the study of skeletal material and sacred objects must be achieved with dignity. Research on such subjects and their housing and care must be accomplished in a manner acceptable not only to fellow professionals but to those of various beliefs.
>
> Although it is occasionally necessary to use skeletal and other sensitive material in interpretive exhibits, this must be done with tact and with respect for the feelings for human dignity held by all peoples. Such an exhibit exists to convey to the visitor an understanding of the lives of those who lived or live under very different circumstances. These materials must not be used for other more base purposes.

AAM and its member museums and museum professionals continue to endorse and adhere to this statement and are involved in a continual process of education and reevaluation of the ethical responsibilities of the museum field. The International Council of Museums, of which AAM is the representative for the United States, has adopted a similar statement on the treatment of human skeletal remains and sacred artifacts in its Code of Professional Ethics. The museum community continues to work with Native Americans in applying these professional ethics and standards to the treatment and care of Native American objects.

It is widely recognized that museum collections represent a vast and irreplaceable national treasure. In a sense, museums are the stewards of this treasure, dedicated to the care, maintenance and interpretation of the objects of our artistic, cultural, natural and scientific heritage. Native American collections are indeed a part of the reflection of the nation's rich and diverse history. Although the history and prehistory of this nation are directly related to the heritage of modern Native Americans, they are also part of the heritage of all who call themselves Americans. The arbitrary removal of objects from museum collections may indeed far lessen public exposure to and appreciation of Native American culture and thus to our national heritage.

The general intent of S. 187 is strongly supported by AAM and the museum community. Museums endorse the purposes set forth to ensure continued cooperation between museums and Native Americans, to broaden and enhance the technical skills of Native Americans for the care, conservation and preservation of Native American artifacts, and to pay proper respect and dignity to the human remains and artifacts of Native Americans.

The findings of the proposed legislation, however, assume that museums and Native Americans have not worked in a cooperative spirit to preserve, interpret and work toward the resolution of questions of repatriation of Native American materials. Admittedly some museums have failed to exercise adequate sensitivity and responsiveness to the concerns of Native Americans in this area. Yet, on the whole museums are addressing Native American concerns in a responsible manner. At the same time, the museum profession is working actively to continue to increase sensitivity throughout the field to these issues.

The Denver Art Museum, for example, worked with the Zuni to return two Rain Gods of spiritual significance. Other museums, such as the Portland Art Museum, the Field Museum of Natural History in Chicago, the Heard Museum in Phoenix, and the Museum of New Mexico in Santa Fe, all with substantial collections of Native American materials, are working closely with Native Americans on the interpretation of their Native collections, public programming and other collaborative projects, and on resolving concerns regarding the repatriation of Native American materials. Also, through its Native American Museum training program, the Smithsonian Institution provides important training and technical assistance to Native Americans on a national level. These are just a few of the many examples that can be cited in which museums are working in cooperation with Native Americans.

There are a number of more specific aspects of this bill that concern the museum community. Museums across the nation have provided millions of dollars for the acquisition, care, research, preservation and exhibition of Native American collections. Under the provisions of this bill, twenty to twenty-five percent of the objects in these collections, which collectively number in the hundreds of thousands (excluding archaeological materials) would be impacted by this legislation.

The bill does not include a provision for the compensation of a museum for the appraised value of an object, for the cost of care and maintenance during its tenure in the museum and for the cost of transfer when that object is returned to a Native American community. Monetary claims for repatriated items could run into tens of millions of dollars. Since many of these items would be transferred from the public to the private domain without fair compensation, the legal precept of public trust propery would be violated.

The proposed Native American Advisory Board is accorded absolute right to determine the dispensation of potentially millions of objects which have been held in public trust. Museums and other institutions, as well as Native American organizations and groups, will be without any legal recourse on decisions reached by this body. This provision abrogates the legal rights of museums and all parties by denying them access to judicial review.

The composition of the Native American Museum Advisory Board established in this bill seems inequitable to the museum community and the general public. Of the proposed nineteen members of the Museum Advisory Board, only two are to represent both museums and universities. To establish an advisory board for the purpose of determining the disposition of museum collections, of which one-tenth or less of the board's members are museum professionals, is clearly inappropriate.

Penalties for failure to adhere to the Board determination are also inequitable. The penalty to museums for failure to comply with the Board settlement will result in the museum's ineligibility of any federal funds for two years. Failure on the part of a tribe, however, will result in ineligibility to receive federal funds designated for historic preservation for a period of two years. The total funds designated for historic preservation purposes to Native Americans at present are extremely small. Although federal funds received by museums are also small, these funds are a critical component of their budgets particularly through the leverage they provide in raising private support.

While museums strive to record all objects in their collections, thereby making them more accessible to the public, limited manpower and technology have created a backlog in recordkeeping in some museums. To comply with the bill's provision requiring museums to prepare a provenance on all skeletal remains and sacred artifacts, substantial increases in federal funds to museums for this purpose would be needed.

The technical assistance, education and collaborative programs to be provided through the Native American Center are important to the advancement of Native American skills and training, and to the understanding and appreciation of Native American culture by the public. Yet, much of this assistance is currently available under other federal and private programs, most notably by the Smithsonian Institution's Native American Museum Program. Thus, not only would the establishment of the Center be costly, but it also may compete for federal dollars with other important programs on Native American training and education. An increased federal commitment in this area channelled through existing programs may be more cost-effective.

Although we strongly support the general intent of S. 187, to respect the concerns and needs of the Native American community, their culture and traditions, and to provide Native Americans with the necessary technical training and education in the curation and care of significant objects, we believe that rather than enact federal legislation, the issue of repatriation of Native American or other artifacts of museum collections should be resolved on a case-by-case basis through direct negotiation among the principal parties involved.

Native Americans and America's museums will be well served by continuing to focus their efforts on collaborative and cooperative endeavors which will further the public understanding and appreciation of the tremendous contributions of Native American cultures to American society and to the preservation and development of those cultures. Funding dedicated to the purposes of collaborative efforts and projects through existing funding agencies would produce much more positive and longstanding results in preserving Native American cultures than the results this act would inevitably produce -- confusion, confrontation, and legal and ethical controversy far in excess of that which exists at present.

The American Association of Museums is pleased to offer its continued support and assistance to the Committee as deliberations on the "Native American Cultural Preservation Act" proceed.

PREPARED

STATEMENT OF THE YAKIMA INDIAN NATION ON S.187

The Yakima Indian Nation, a federally recognized Indian Tribe since the execution of its treaty with the United States on June 9, 1855, is a traditional Indian tribe, organized pursuant to its own laws and traditions, not a tribe organized pursuant to any federal statute. The members of the Yakima Nation have retained their culture and beliefs and continue to live in traditional ways. Hydroelectric dam development on the Columbia River, federal projects including the Hanford atomic works and the United States Army Yakima Firing Center, and numerous road and highway developments, have resulted in extensive excavation of human skeletal remains, grave goods and other sacred artifacts of peoples with whom the Yakima Nation has cultural affinity. Further, numerous "private institutions" and individuals have excavated graves and taken skeletal remains, grave goods and sacred artifacts from those places. Further, private individuals, acting pursuant to federal permits or licenses, such as for the building of privately owned but federally authorized hydro projects, have also had a significant impact upon the excavation and removal of human skeletal remains and sacred artifacts culturally connected to the Yakima Indian Nation. Many of these goods and remains are in the possession of museums as defined in Senate Bill 187, but many are also in the possession of private collectors. As has been the case for other Native Americans and Native Hawaiians across the United States, the Yakima Indian Nation has had little success in convincing those in possession of these articles to return them to their proper place. Accordingly, the Yakima Indian Nation welcomes and applauds the introduction of Senate Bill 187 evidencing an intent on the part of the United States Congress to remedy the moral wrong done to Native peoples by removal of these remains and sacred artifacts over the years.

The Yakima Indian Nation is a traditional Indian tribe following its own laws and cultural beliefs. The Yakima Nation has a duly appointed Legislative Committee and a Culture Committee. These committees are authorized to speak for and on behalf of the Yakima Indian Nation pursuant to the resolution attached to this testimony. The Yakima Indian Nation, while on occasion supporting and endorsing the position of other Indian nations or Indian organizations, wishes to make clear that its position will be presented through the authority of the Yakima Indian Nation and its representatives on the issues contained in this legislation.

The Yakima Indian Nation has carefully and thoroughly reviewed S.187 and has prepared the attached amendments which we believe are in accord with the intent of the bill and strengthen the abilities of Native Americans and Native

Hawaiians to both secure the return of human skeletal remains, grave goods and sacred artifacts to their rightful owners and places of burial and also to protect sacred places from desecration in the future.

First, we believe, in accord with the position taken by the Native American Rights Fund in its letter of December 18, 1986 to Senator Melcher, that the legislation should reflect that Native American people, not the federal government or any other agency or private individual, are the owners of human skeletal remains and sacred artifacts both in the possession of those institutions or individuals and those that still remain in place. In that regard, we have proposed amendments to section 2(2) and the addition of a new section 4, recognizing the ownership of Native Americans and clarifying that the purpose of this act is to recognize that title, to provide a mechanism for return of those items to their rightful owners, and to ensure that existing graves and human remains are protected in place. The amendment of the bill to include title and ownership to these remains should result in tribes that have cultural affinity with specific remains dealing directly with the institution or individuals presently having possession, thereby negating the need for the creation of the Native American Museum Board, at least in its present configuration. The Yakima Indian Nation believes that the passage of this legislation recognizing ownership in Native Americans or Indian tribes will allow individual tribes to negotiate independently from a position of strength with institutions having possession of skeletal remains, grave goods and sacred artifacts. We have not in the past enjoyed that position due to the federal government's position that it, rather than the Native Americans having cultural affinity with the remains, owned said remains. A change in that legal position would, in the opinion of the Yakima Indian Nation, properly and quickly allow possession to pass to the appropriate Native Americans or Indian tribe. The Yakima Indian Nation requests the bill be amended to accomplish this purpose.

However, in the event it is determined that the Native American Museum Board, in at least some form is necessary, the Yakima Nation would propose the following amendments:

Amend section 4(b)(1) to include that the Board shall consist of 23, rather than 17 members. This amendment is necessary to place an Indian voting majority on the Board, and to recognize representation from the 12 Bureau of Indian Affairs regions of the country. Not only does this properly provide a voting majority on the Board for Native American representatives, but it further provides representation for each area of tribes having cultural affinity with specific remains or sacred artifacts removed from these regions. It is important for the Indian people to have an individual on the Board from their respective regions with whom they can confer on issues of importance to them. Six (6) Native Americans are insufficient to provide fair representation to Indian people.

The Yakima Nation further requests the amendment of 4(b)(7) to include that a quorum shall require at least one-half of the persons present to be Native American representatives. The committee membership section should also be amended under section 4(b)(1)(B) to include that the Congressional members should be appointed by the Senate Select Committee on Indian Affairs and the House Interior Committee.

The Yakima Nation feels that section 5, dealing with the Board process must also be revised in several important aspects in order to ensure that the intent of the bill is fully implemented. First the Yakima Nation requests that section 5(b)(2) be amended by the inclusion of language making it clear that the Board shall have the responsibility to implement agreements reached pursuant to its mediation process as well as through the compromise settlement procedure. While this is certainly the intent of the bill, it is not clear and accordingly should be clarified.

In that same regard section 5(d)(1)(A) should be amended to include sanctions against museums or institutions violating an agreement as well as a compromise settlement.

Section 5(b)(1) should have an additional paragraph added, preventing destruction, transfer or other disposition of any material subject to a petition immediately upon notification of the filing of a petition. This would prevent any misunderstanding between the parties as to the disposition of any remains or sacred artifacts pending a decision by the Board. As many of these disputes have been continuing for a number of years, the Yakima Indian Nation feels that the bill should provide a speedy remedy for return of the remains and artifacts. Accordingly, it is requested that section 5(a)(2)(A) be amended to provide for a 6 month rather than a 1 year period.

As much of the information garnered by museums and other institutions from their study and research of the remains and sacred artifacts presently in their position is highly confidential and of a nature that Native Americans and Indian tribes do not wish to be circulated to the general public, the Yakima Nation deems is necessary to have review and deletion powers over publication of materials garnered by any allowed research. Accordingly, section 5(c)(2)(B)(ii) should be amended to add a proviso allowing the affected tribes to edit out confidential information prior to publication.

The function of the Board and method by which the Board will reach determination on disputed issues is unclear. The bill as drafted states that the Board will "mediate" negotiations, but if said negotiations are unsuccessful the Board shall reach a compromise settlement. In such a proceeding, the Board is acting in a quasi judicial capacity and the Yakima Indian Nation believes that the Board should function in a manner similar to other agencies pursuant to the Administrative Procedures Act, 5 U.S.C. 700 et seq. As is noted in our requested amendment to section 5(e), making Board decisions subject to judicial review, the Yakima Nation feels that there be an established record from which to operate on these issues.

The Yakima Nation also requests that section 5(c)(2)(A) be amended by adding a new subsection that requires that repatriation and preservation of all manuscripts, etc. dealing with these remains be returned with the remains unless agreement can otherwise be reached. Any such repatriation should be accomplished at no cost to the Indian Tribe involved. This can be accomplished by adding a new subsection to section 5(c)(2)(A) as proposed in the attachments hereto.

A continuing concern to the Yakima Indian Nation, and we believe to Native American people throughout the United States, is the lack of effective penalties for refusals by public and private institutions to return remains and sacred artifacts to their rightful owners. While this bill provides for defunding of institutions for a two year period should they refuse to comply with an agreement or compromise settlement, the Yakima Indian Nation feels that those penalties are inadequate in light of the great cultural and religious significance of the articles being considered. The Yakima Nation believes that not only institutions, but also the individuals involved with making such a decision should be subject to the civil and/or criminal penalties of 16 U.S.C. 470 ee and 470 ff for their knowing or willful violation of any such agreement or compromise. The Yakima Nation has proposed specific language as an amendment to section 5(d)(1)(B) to include said penalties.

Lastly, section 5 does not clarify whether the museum Advisory Board is an independent, autonomous agency or if it is intended to function under some other department such as Interior. The Yakima Nation does not propose a specific amendment on that issue, but feels that the Board should function independently and that the appropriate federal departments be required to recognize and implement the provisions not only of this act, but of the agreements and compromise settlements reached by the Board.

With regard to section 6 of the legislation, the Yakima Indian Nation supports the concept of a Native American

Center and supports its inclusion in this legislation. The Yakima Nation requests that the funding for the Native American Center be clearly authorized in this legislation.

The Yakima Nation wholeheartedly endorses Senate Bill 187's recognition of the present inadequacies of 16 U.S.C. 470aa et seq., the Archaeological Resources Protection Act. Amendments to that legislation are necessary not only to make it conform with the provision of S.187, but to strengthen the act and prevent future excavation and/or desecration of Indian graves, human skeletal remains, and sacred artifacts rightfully belonging to Native Americans or tribes having cultural affinity with those objects. The Yakima Indian Nation views Senate Bill 187, and its proposed amendments to 16 U.S.C. 470aa et seq., as an opportunity to accomplish what Congress initially intended in that legislation to-wit: theprotection of places, sites and objects sacred to Indian peoples of the United States. The Yakima Nation believes that the Archaeological Resources Protection Act should be amended to exclude from the definition of "archaeological resources", the words "graves and human skeletal remains" in 16 U.S.C. 470bb(1). Removing those words from the definition of archaeological resources is consist with Yakima's previously proposed amendments requiring that ownership of those items remain in Indian peoples. It will also prevent future problems of possession of human skeletal remains and sacred artifacts by institutions or person who claim ownership and refuse to return said items to their rightful owners, as these remains and artifacts will be excavated.

Consistent with striking the words "graves and human skeletal remains" from the definition of archaeological resources, it is necessary to amend 16 U.S.C. 470aa(b) to require that one the purposes of the Archaeological Resources Protection Act is to protect graves and skeletal remains in place and to assure that sacred sites remaint intact in the future. An amendment to 16 U.S.C. 470aa(b) limiting actions taken on private lands which can be done only pursuant to federal permit or license is necessary to fully implement the intent of both S.187 and the Archaeological Resources Protection Act. A recent example of the need for such a provision arose during a Federal Energy Regulatory Commission hydroelectric permit exemption process involving an area of extreme cultural and religious significance to the Yakima Indian Nation. The proposed hydroelectric development was allowable only upon the granting of an exemption from formal licensing procedures by the Federal Energy Regulatory Commission. The Yakima Nation vigorously opposed this application and ultimately prevailed, but was unable to use the full extent of 16 U.S.C. 470aa et. seq. due to its "private lands" exemption. In this proceeding the developer raised serious, substantive questions regarding the applicability of the Archaeological Resources Protection Act to private property arguing that it was inapplicable even though the action to be taken could only be allowed by a federal process. While the Yakima Indian Nation feels that the intent of Congress was to provide protection under the act to Native Americans cultural and religious sites and the activity that would affect them could only be done pursuant to a federal permit or license, the Act needs to be amended to make that crystal clear. In the situation the Yakima Nation faced, the basis for the private landowner's actions affecting cultural and religious sites, as well as graves and human skeletal remains, was because of the federal license process. Such activity should be subject to the provisions of 16 U.S.C. 470aa, just as if the land were federally owned. The Yakima Nation does not suggest that the bill be amended to cover every situation involving private land or individuals, but only to provide that the federal government not allow development when it will result in destruction or derogation of the sacred items intended to be protected from federal action under the Archaeological Resources Protection Act.

In keeping with the position of the Yakima Indian Nation that graves and skeletal remains should be protected in place, on site, 16 U.S.C. 470cc(b) should be amended by adding a new subparagraph, requiring that no permit be issued unless there is a finding that the activity will not effect graves or human skeletal remains which shall be protected in place.

Section 470cc(3) should be amended to provide an exception to "archaeological resources" found on public lands for "graves and skeletal remains," as title to those items the Native American peoples having cultural affinity to the item, not to the United States government.

Finally the Yakima Indian Nation requests that Section 470ee(d) be amended to provide for an increase in the penalty for first offenses for violations of the Act to $25,000 and $50,000 respectively. The Yakima Indian Nation believes that the increase in the penalties and resulting publicity would do much to prevent the continuation of violations. The present penalties have proven as ineffective deterrent and the Yakima Nation believes the stiffer penalties will be of assistance in enforcement.

The Yakima Nation thanks you for the opportunity to comment on this most important piece of legislation. The Yakima Nation pledges its assistance to the committees of Congress in seeing that a viable, effective piece of legislation is formulated which will protect these most important assets, for the Native American people of the United States.

RESOLUTION

WHEREAS, museums and other institutions have in their possession numerous Native American skeletal remains and sacred artifacts, and

WHEREAS, Native American people and Tribes wish to regain possession of those remains and sacred artifacts so that they may be returned to their proper places of burial are afforded the respect they are due, and

WHEREAS, the museums and other institutions have been reluctant to or have refused to return the remains and sacred artifacts to the Native Americans having cultural affinity with them, and

WHEREAS, Senator John Melcher has introduced Senate Bill 187 to provide a mechanism for returning these remains and sacred artifacts to their rightful owners and amend 16 U.S.C. 470 aa (The Archaeological Resource Protection Act) to deal with potential future conflicts, and

WHEREAS, the Yakima Indian Nation supports the intent of S.187, but feels that amendments are necessary to strengthen the bill, and

WHEREAS, other tribes and national Indian organizations have supported the intent of the bill and proposed amendments, and

WHEREAS, the Yakima Indian Nation, through its Culture and Legislative Committees, intends to propose its own testimony and amendments for inclusion into the hearing record on S.187 before the Senate Select Committee on Indian Affairs, NOW, THEREFORE, be it resolved as follows:

1. Yakima Indian Nation supports the intent of S.187; but feels that amendments to the language of the bill are necessary;

2. The Yakima Indian Nation hereby submits the attached testimony and proposed amendments for inclusion into the hearing record on S.187 before the Senate Select Committee on Indian Affairs; and

3. The Legislative and Culture Committees of the Yakima Indian Nation shall monitor this legislation through Congress, and pursue the amendments herein proposed.

DONE AND DATED this _____ day of _________________, 1987.

Melvin S. Sampson, Chairman
Yakima Tribal Council

ATTEST:

Virginia S. Harrison, Secretary
Yakima Tribal Council

"YIN Proposed Amendment to Section 2(2) of S.187"

1. Section 2(2) following ". . . Americans;"

Remove the semicolon and add the following:

". . . and belong to those Native Americans."

"YIN Proposed Amendment to Section 3(9) of S.187"

2. Section 3(9) shall be amended to read as follows:

". . . agency, other institution, or private party acting pursuant to a permit issued under 16 U.S.C. 470 aa et seq., which possesses. . ."

"YIN Proposed Amendment Adding A New Section to S.187"

3. Provide a new section to the bill, as a section 4, which would read as follows:

PURPOSES

Sec. 4. The purposes of this act are as follows:

(A) TO recognize the title and ownership of Native Americans, Native Hawaiians, and Indian Treaties to sacred artifacts and skeletal remains held by museums throughout the United States;

(B) TO provide a mechanism whereby these sacred artifacts and skeletal remains shall be returned to the Native Americans, Native Hawaiians and Indian Tribes having cultural affinity with those artifacts and skeletal remains;

(C) TO provide a mechanism whereby museums and Native Americans, Native Hawaiians and Indian Tribes can cooperate in accomplishing these purposes while attempting to accommodate the museums access to remains and artifacts for research, study or exhibition.

(D) TO insure that existing graves and human skeletal remains located on public lands, or on private lands where said remains or sites would be subject to excavation or disturbance pursuant to any federal permit or license process, are protected in place.

"YIN Proposed Amendment to Section 4(b)(1) of S.187"

4. Amend 4(b)(1) to read as follows:

The Board shall consist of the following 23 members.

"YIN Proposed Amendment to Section 4(b)(1)(A) of S.187"

5. Amend 4(b)(1)(A) to read as follows:

"12 Indians . . . tribes, one-Indian representing each of the 12 different BIA areas."

"YIN Proposed Amendment to Section 4(b)(7) of S.187"

6. Amend 4(b)(7) to read as follows:

Then amend Section 4(b)(7) to read as follows:

The presence of a majority of the members of the Board who are eligible to vote shall constitute a quorum for the purpose of conducting the business of the Board, provided that at least one-half of those present are representatives appointed pursuant to Section 4(b)(1)(A).

"YIN Proposed Amendment to Section 5(b)(2) of S.187"

7. Amend 5(b)(2), by the addition of the following language:

> ". . . dispute. The Board shall implement any such agreement of the parties in the same manner as a compromise settlement formulated pursuant to Section (C)(1)."

"YIN Proposed Amendment to Section 5(d)(1)(A) of S.187"

8. Amend 5(d)(1)(A) to read as follows:

> (A) The agreement or compromise settlement formulated under subsection (b)(2) or (c)(1). . . .

"YIN Proposed Amendment to Section 5(b)(1) of S.187"

9. Add a new section to 5(b)(1) as (iii):

> "Immediately upon receipt of a petition the Board shall notify the museum that none of the subject materials may be destroyed or transferred to any other party. Failure to comply with this notice shall subject the museum to the sanction under subsection (d)(1) hereof."

"YIN Proposed Amendment to Section 5(a)(2)(A) of S.187"

10. Amend 5(a)(2)(A) as follows:

> "The date that is 6 months after . . ."

"YIN Proposed Amendment to Section 5(c)(2)(B)(ii) of S.187"

11. Amend to 5(c)(2)(B)(ii) as follows:

> ". . .published. Provided, that the affected tribes shall be allowed to edit out confidential information prior to publication."

"YIN Proposed Amendment to Section 5(b) of S.187"

12. Amend 5(b) to add a new section (2) as follows:

> The determination hereunder shall be conducted pursuant to the provisions of the Administrative Procedures Act, 5 U.S.C. 700 et seq.

"YIN Proposed Amendment to Section 5(c)(2)(A) of S.187"

13. Amend 5(c)(2)(A) by adding a new subsection (III) as follows:

> "(III) repatriation and preservation of all papers, documents, manuscripts, and reports dealing with these remains and artifacts of the Indian Tribes, member of an Indian Tribe or of a Native Hawaiian.

"YIN Proposed Amendment to Section 5(c)(2)(B) of S.187"

14. Amend 5(c)(2)(B) by adding a new subsection (iii) as follows:

> "Any repatriation agreement or compromise settlement shall be accomplished at no cost to the Indian Tribe or Native Hawaiian group."

YIN Proposed Amendment to Section 5(d)(1)(B) of S.187"

15. Amend 5(d)(1)(B) by adding language following ". . . funds." as follows:

> "Further, the civil and criminal penalties of 16 U.S.C. 470 ee and 16 U.S.C. 470 ff may be imposed against any museum or individual who knowingly violates the terms of an agreement or compromise settlement."

"YIN Proposed Amendment to Section 5(e) of S.187"

16. Amend Section 5(e) to read as follows:

> "Any determination made by the Native American Museum Advisory Board under this section shall be reviewable by a court of competent jurisdiction pursuant to the Administrative Procedures Act or other applicable law."

"YIN Proposed Amendment to Section 7 of S.187"

17. Amend Section 7 to include the following amendments to 16 U.S.C. 470 aa et seq.

1. Amend 16 USC 470 aa(b), second line to read as follows:

". . . resources, graves and skeletal remains in place and sites . . .";

2. Amend Section 7 to include the following amendment to 16 U.S.C. 470 aa(b) as follows:

". . . on public lands, lands upon which federal funds will be expended, Indian lands and private lands on which the owner requires a federal permit of any nature to conduct an activity which may impact said resources or sites, the protection. . ."

3. Amend 16 USC 470 bb(1) striking "graves, human skeletal remains" from definition of "archaeological";

4. Amend 16 USC 470 cc(b) by adding a new subparagraph (5) as follows:

> (5) The activity will not affect graves or human skeletal remains which shall be protected in place.

5. Amend 16 USC 470 cc(3) to read as follows:

"The archaeological resources, excluding graves and skeletal remains, which are excavated. . ."

6. Amend Section 470 ee(d) to provide for increasing the penalties for first offenses to $25,000 and $50,000 respectfully.

7. Amend Section 7 to strike Section 7(d) adding a new section (k) to 16 U.S.C. 470 cc, as the deletion of graves, human skeletal remains or sacred artifacts are not subject to the permit process and therefore section K is unnecessary.

WANAPUM INDIAN TRIBE
WANAPUM VILLAGE
P.O. BOX 904 - MATTAWA, WA. 99384

February 19, 1987

Honorable Daniel Inouye, Chairman
Honorable Daniel Evans, V-Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Gentlemen,

From time immemorial we, the Wanapum people, (river people) have dealt and still live, along the Columbia River that stretches from well above Priest Rapids to the mouth of Snake River.

Since prehistoric times we have buried our dead along the lands adjacent to the Columbia River, the lower reaches of Crab Creek, the Yakima River and the Snake.

Without our permission, consent or notification our dead have been excavated and their remains taken to distant lands.

> It is our deep spiritual and religious belief that the remains of our ancient ones be returned to the land from which they are taken...not to areas far removed from their original burial place..to do less, it is our strong belief that their spirits are doomed to unrequited peace and eternal unrest.

In addition, a very important provision with deep spiritual and religious meaning is that those cultural item that we recovered with the burials be returned so that they can once again be buried with the human remains in their own homeland.

We therefore strongly urge that the remains of our ancient forbearers be returned to the land of their original burial. Our desires in this matter are fundamental to our religious and spiritual beliefs.

Sincerely,

Frank Buck
Frank Buck, Religious Leader
Wanapum Indian Tribe

FB/asr